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Supreme Court of the United States

OCTOBER TERM, 1959.

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

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J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased).

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW.

The opinion of the District Court (R. Vol. 12, pp. 2282-2317) reported 158 F. Supp. 830. A copy is appended as Appendix I.

The order of the District Court dismissing the Petitioner's complaint (R. Vol. 12, pp. 2317-2318). A copy is appended as Appendix II.

The additional opinion (findings of fact and conclusions responsive to motion for modification) of the District Court (R. Vol. 13, pp. 2471-2474). A copy is appended as Appendix III.

The final judgment rendered by the District Court (R. Vol. 13, pp. 2477-2479). A copy is appended as Appendix IV.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered August 6, 1959, rehearing denied September 30, 1959, and is reported in 268 F. 2d. 882. A copy is appended as Appendix V.

JURISDICTION.

The judgment of the Court of Appeals was entered August 6, 1959 and rehearing was denied September 30, 1959.

Jurisdiction to issue the writ rests on Title 28, United States Code Annotated, Section 1254.

QUESTIONS PRESENTED.

In this case the Court of Appeals has decided an important state question in a way that is in conflict with applicable state law. Furthermore in this case the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision. In this application for writ of certiorari the questions for review are:

(a) Under the applicable law of the State of Louisiana, was the Petitioner (sometimes hereinafter referred to as Stricker) entitled to the relief prayed for in the absence of a specific authenticated contract in writing duly recorded as held by the court below, notwithstanding the fact that the record contains a multitude of letters, notes, memoranda, accountings and other writings between Stricker and Morgan (original defendant, since deceased) and others conclusively showing the contractual relationship that existed between Stricker and Morgan, which bring the case squarely within the well established jurisprudence

of Louisiana under Articles 21, 2292, 2293, and 2294 of the Louisiana Civil Code[1] and the following decisions of the Supreme Court of Louisiana: *Viens v. Brickle*, 8 Mart. (O.S.) 11 (1820); *Delamour v. Roger*, 7 La. Ann. 152 (1852); *Malady v. Malady and Caldwell*, 25 La. Ann. 448; *Succ. of Pereuilhet*, 23 La. Ann. 294 (1871); *Succ. of Llula*, 44 La. Ann. 61 (1892); *Sparrow v. Sparrow*, 231 La. 966, 93 So. (2d) 232 (1957); *Thompson v. Walker*, 235 La. 132, 103 So. (2d) 65, 67 (1958).

(b) Was not Stricker's right to relief established by virtue of the judicial admissions of Morgan in the course of trial in the District Court as well as by Morgan's admissions in writings, in evidence, of Stricker's interest in the subject of litigation?

(c) Is there in fact any material conflict in the evidence as to the contractual relationship and rights of the parties litigant?

(d) Is there in fact evidence in this record, conflicting or otherwise, that supports the findings of fact of the District Court that have been sanctioned by the opinion of the Court of Appeals?

(e) Are the findings of fact of the District Court, sanctioned by the decision of the Court of Appeals, contrary to the undisputed evidence in the record?

(f) Did the Court of Appeals err in sanctioning the decision of the District Court (likewise erroneous) in

[1] See Appendix VI.

holding that the relationship of joint adventurers cannot be established under the Louisiana jurisprudence in the absence of an authenticated recorded contract in writing, again notwithstanding unauthenticated and unrecorded written evidence of the existence of such contract?

(g) Did the Court of Appeals err in sanctioning the action of the District Court (likewise erroneous) in limiting the admitted effect of the judicial admissions of Defendant Morgan made in course of trial in the District Court as to timber rights admittedly acquired, *ab initio*, and vested in Stricker, which judicial admission (R. Vol. 4, pp. 692-693) contained no limitation of ownership but the effect of which was limited by the District Court (R. Vol. 13, pp. 2471-2474) with no evidence to support such action.

(h) Did the District Court, with subsequent sanction by the Court of Appeals, make findings of fact of which there is no evidence in the record and unsupported by any logical inference from the facts?

(i) Did the District Court make a decision (sanctioned by that of the Court of Appeals) that is contrary to all of the evidence (undisputed and uncontroverted in any material aspect) in this record?

STATEMENT OF THE CASE.

BASIC FACTS:

R. M. Stricker, a resident of Wilkinson County, Mississippi, petitioner herein, filed suit against J. P. Morgan, a

resident of Jefferson Parish, Louisiana, for an accounting and to recover his undivided one-half interest in Esperanza Plantation, situated in Concordia Parish, Louisiana. Morgan removed the case to the United States District Court for the Southern District of Mississippi. The case was tried in that court and a judgment was rendered adverse to Stricker. Stricker appealed to the United States Circuit Court of Appeals for the Fifth Circuit. That court affirmed the decision of the District Court.

The decision adverse to Stricker is contrary to the established jurisprudence of Louisiana as will be shown hereinafter.

The opinion of the circuit court rendered herein, in part, states:

> "Defendant (Morgan) stands on the argument that plaintiff (Stricker) is not entitled to any relief, because his relationship with plaintiff (Stricker) was governed by Louisiana law, which barred plaintiff's recovery because the contract was not in writing."

Similarly, the opinion of the district court held Stricker was trying to establish title to Esperanza Plantation by parol evidence. This is not true.

To the contrary, Stricker introduced correspondence, memoranda and other written records, as will be in part set out hereinafter, conclusively showing Stricker is entitled to an accounting and to be awarded the interest in Esperanza Plantation he claims in this litigation.

Stricker's claim to an accounting and an undivided one-half interest in said Esperanza Plantation is based particularly, but not exclusively, on the following facts shown by the record.

Prior to November, 1935, Stricker for years had been engaged in buying and selling timber and timberlands, in logging and timbering businesses and operations, and Morgan had been operating a sawmill and box manufacturing business in his home parish in Louisiana under the name of the Louisiana Box Company, and about that time Stricker and Morgan agreed to pool their talents and capital in the business of buying certain lands and timber in the area familiar to Stricker, that is, Mississippi and Louisiana, particularly along the Mississippi River.

Said agreement entered into by and between Stricker and Morgan on or about November 16, 1955 was a profit and loss sharing contract and agreement which created the status between them that has been denominated by them as a partnership. Their first operations were in Mississippi. No formal written articles of agreement were executed by the parties. The fact of the agreement and the agreement itself and the terms and provisions thereof are conclusively shown by the acts and conduct of the parties between themselves and with others, by many instruments, memoranda, communications, and accounts and other items in writing, shown in the record in this cause.

The record in this case, which contains most of the correspondence, financial statements, accountings, instructions, and other writings between Stricker and Morgan and other parties conclusively establishes this agreement. For example, on August 8, 1942, replying to a letter of August 7th written by Stricker to Morgan detailing receipts and disbursements, profits and losses for standing timber operations on the Point Breeze *timber tract in Concordia Parish, Louisiana*, Morgan wrote a letter to Stricker (See original, Plaintiff's Exhibit 104, Sheet 15, offered in evidence at R. Vol. 8, p. 1448) as follows:

> "*Remember our original agreement on every deal that we made at the start was that I was to take off 6% for the money that was invested until it was paid*, but when there was only one man by the name of Stricker in it with Morgan, Morgan failed to take off the 6% because he likes Stricker".—(Emphasis supplied; see Appendix 2504B, p. 3).

The agreement between Stricker and Morgan, definitely and clearly established by the evidence (letters, financial statements, accountings, cancelled checks, and other writings) was that Stricker, who had expert knowledge of timber, timberlands and plantations, would locate, as opportunities should be presented, various tracts of land and timber that in his opinion could be purchased, managed and handled on a profitable basis; that he would have the timber on said lands cruised and, as and if he should consider the same a profitable purchase, he would present the matter of the purchase to the consideration of Morgan; that upon approval

of such purchase by Morgan on the recommendations Stricker, Morgan would advance and pay all of the purchase price, costs and expenses of acquisition and operation of the properties, including taxes, attorneys' fees and other expenses, and title to all of such properties purchased should be taken in the name of Morgan; that Stricker would manage, look after and control the property, make all contracts for cutting and removing timber therefrom, tend to logging and rafting the timber for delivery to Morgan's plant located in Jefferson Parish, Louisiana insofar as Morgan's requirements were concerned, and in some instances would sell the lands and timber to third parties; Stricker and Morgan would sometime lease the property for exploration for oil and gas, and when Morgan had been repaid the amount of his cash outlays and interest at the rate of 6% per annum thereon, that *all profits would be divided, share and share alike*, between Stricker and Morgan, and thereafter Morgan would convey to Stricker an interest with himself in the land, or timber, or land and timber, as the case might be, Stricker and Morgan sharing equally. Stricker and Morgan shared equally the profits and losses as is undisputably shown by the record. In some transactions, by mutual consent of Stricker and Morgan, other parties would be brought into the particular transaction but always, as the record undisputably shows, Morgan and Stricker would share equally in what remained after Morgan recovered his costs.

* The record contains numerous letters, memoranda, and documents wherein both Stricker and Morgan refer to

their contractural relationship as a partnership. (Original, Plaintiff's Exhibit 75, Sheet 2, offered R. Vol. 8, p. 1411; Original, Plaintiff's Exhibit 88, Sheet 12, offered in evidence at R. Vol. 8, p. 1437; Original, Plaintiff's Exhibit 104, Sheet 15, offered in evidence at R. Vol. 8, p. 1448; Original, Plaintiff's Exhibit 106, Sheets 1 and 2, offered in evidence at R. Vol. 8, p. 1451; Original, Plaintiff's Exhibit 152, Sheet 19, offered in evidence at R. Vol. 9, p. 1595; Original, Plaintiff's Exhibit 107, Sheet 1, offered at R. Vol. 8, pp. 1450-1451 and copy of R. Vol. 8, pp. 1451 and 1453; Original, Plaintiff's Exhibit 111, Sheets 19 and 20, offered at R. Vol. 8, pp. 1450-1451; Original, Plaintiff's Exhibit 113, Sheet 15 and 16, offered at R. Vol. 8, pp. 1450-1451; Original, Plaintiff's Exhibit 113, Sheet 36, offered at R. Vol. 8, pp. 1450-1451; Original, Plaintiff's Exhibit 122, Sheet 9, offered at R. Vol. 8, pp. 1450-1451; Original, Plaintiff's Exhibit 122, Sheet 11, offered at R. Vol. 8, pp. 1450-1451; Plaintiff's Exhibit 125, offered at R. Vol. 8, p. 1464; Plaintiff's Exhibit 133, Sheet 2, offered at R. Vol. 8, p. 1477.)

The record shows Stricker and Morgan purchased under this profit and loss sharing agreement timber and land and sometimes timber alone, the following properties in Mississippi and Louisiana:

(1) Walnut Grove in Wilkinson County, Mississippi

(2) MacKellar in Wilkinson County, Mississippi

(3) Bramlette in Wilkinson County, Mississippi

(4) Kraetzer—Cured Lumber Contract, also known as Cat Island or Dr. Loab timber tract in West Feliciana Parish, Louisiana

(5) Artonish in Wilkinson County, Mississippi

(6) Stockett in Wilkinson County, Mississippi

(7) Point Breeze in Concordia Parish, Louisiana

(8) Esperanza in Concordia Parish, Louisiana

(9) Woodlawn Plantation in Wilkinson County, Mississippi

(10) Mackie Tract in West Feliciana Parish, Louisiana

(11) Beavin's or Cole's Creek in Jefferson County, Mississippi.

A partial list of the documents and writings respecting these transactions between Stricker and Morgan relating to each tract that were introduced in evidence follows:

WALNUT GROVE TRACT.

P-65, Sheets 1, 2, 5, 7, 10, 12, 14-16; P-67, Sheets 1, 15-17, 25; P-68, Sheets 5, 6; P-70, Sheets 6, 9; P-71, Sheet 8; P-72, Sheets 1, 11-13; P-73, Sheet 22; P-74; Sheets 1-4; P-75, Sheets 1-5; P-76, Sheets 1-6, 10-13; P-77, Sheets 5, 10-22; P-80, entire exhibit; P-18, Sheets 1-5; P-83, Sheet 9; P-86, Sheets 1-3; P-88, Sheets 3-5; P-89, Sheets 9-10; P-96, Sheets 1-2; P-100, Sheet 1; P-102, Sheets 2-4, 6-32; P-105, Sheet 17; P-109, Sheets 1-2, 23-24, 30-31; P-110, Sheets 17-18; P-111, Sheets 19-20, 30; P-112, Sheet 1; P-113, Sheets 12, 14, 17-20; P-114, Sheets 4-5, 42-49; P-115, Sheets 1-4; P-116, Sheets 2, 8-10, 13, 14-15, 23-28; P-122, Sheets 1-7, 12; P-127, Sheets 1-7; P-128, Sheets 15-20; P-129, Sheets 1-3, 27-30;

P-130, Sheets 1-8; P-132, Sheets 6-10; P-133, Sheets 2, 8-19; P-134, Sheets 1-11; P-135, entire exhibit; P-147, Sheets 1-4, 6, 12; P-155, Sheets 3, 5, 11; P-159, Sheet 6; P-162; P-217, entire exhibit; D-53.

MacKELLAR TRACT.

P-65, Sheet 10; P-67, Sheets 2-14, 22, 23; P-68, Sheets 1, 2, 4, 7-13; P-70, Sheets 1-5, 7-10, 12-15, 16-20; P-71, Sheets 1-6, 9-14, 17; P-72, Sheets 1-4, 6-10; P-73, Sheets 1-8, 11-13; P-91, Sheet 5; P-102, Sheets 5-32; P-106, Sheet 5; P-113, Sheet 24; P-121, Sheets 1-2; P-128, Sheet 5; P-147, Sheets 5, 7, 14-15, 17; P-148, Sheets 1-6, 15-16; P-152, Sheet 18; P-154, Sheets 8-10, 23.

BRAMLETTE TRACT.

P-72, Sheet 5; P-97, Sheet 1; P-149, Sheets 1-3, 6-8, 11-12, 16, 19; P-150, Sheet 4; P-152, Sheet 2; P-153, Sheet 13; P-155, Sheets 22-23.

KRAETZER TRACT.

P-71, Sheets 17, 18; P-82, Sheets 1, 6; P-97, Sheet 3; P-103, Sheet 1; P-104, Sheets 1-4; P-106, Sheets 1-4; P-148, Sheets 11-14; P-163; D-80.

ARTONISH TRACT.

P-76, Sheets 7, 8, 16; P-77, Sheets 1-4, 6; P-86, Sheet 4; P-88, Sheets 1-2, 6-12; P-89, Sheets 1-5, 7-8; P-96, Sheet 3; P-99, entire exhibit; P-100, Sheets 1, 10, 18; P-101; P-105, Sheets 4-7, 14, 17; P-106, Sheet 4; P-109, Sheets 1-2, 8-9, 11, 12; P-110,

Sheets 1, 14, 16, 31; P-111, Sheets 1-5, 6, 10-11, 27; P-113, Sheets 15-16, 28-29, 31, 35-36; P-114, Sheets 12-40; P-115, Sheets 10-11, 17-19, 22-24; P-116, Sheets 16-22; P-117, Sheets 1-2; P-121, Sheets 1-2, 15; P-126, Sheets 2, 8-9; P-128, Sheets 1-3, 14; P-129, Sheets 5-10, 14-16, 21-23; P-130, Sheets 11-15, 20-23; P-133, Sheet 2; P-150, Sheets 1-3; P-152, Sheets 1, 11-14, 18, 21; P-154, Sheets 8-12, 16-17; P-155, Sheet 32; P-165; P-166; P-167; P-168; P-169; P-170; P-171; P-172; P-213; P-215; P-21y; P-218; P-219; P-220; P-221.

STOCKETT BROTHERS TRACT.

P-79, Sheets 2-6, 8; P-109, Sheets 5, 15-16, 21-22; P-111, Sheets 6, 8-9, 30-31; P-113, Sheets 15-16, 28-29, 35-36; P-114, Sheet 41; P-115, Sheets 3-4, 20-21; P-116, Sheets 2, 27-28; P-117, Sheet 1; P-123, Sheets 1-4; P-127, Sheet 1; P-129, Sheet 4; P-130, Sheet 10; P-149, Sheet 20; P-152, Sheet 10; P-154, Sheets 8-10; P-155, Sheets 12-13, 33-37, P-174; P-215.

POINT BREEZE.

P-73, Sheets 28-31; P-76, Sheet 77; P-89, Sheets 11-12; P-91, Sheets 2-3; P-92, entire exhibit; P-100, Sheet 8; P-104, Sheets 5-15; P-105, Sheets 1-3, 13; P-108, Sheets 5-8; P-109, Sheets 3-5, 13, 15; P-110, Sheets 5-12, 19-30; P-111, Sheets 12-18; P-112, Sheets 8-22; P-113, Sheets 1-11, 13, 21-23, 25; P-114, Sheets 1-3, 6-11; P-152, Sheet 20; P-153, Sheets 15, 19-20; P-155, Sheets 1-2, 9; P-175; P-176; P-177; D-101; D-102; D-104.

ESPERANZA TRACT.

P-83, Sheets 1-8; P-84; P-85, Sheet 1, 2; P-87, Sheet 1; P-88, Sheet 12; P-94, entire exhibit; P-98, entire exhibit; P-109, Sheets 25-26; P-115, Sheets 5-9; P-116, Sheets 1, 3, 6-7; P-117, Sheet 3; P-118; P-119, Sheets 1-15; P-120, entire exhibit; P-123, Sheets 5-7; P-124, Sheets 1-4; P-126, Sheets 3-7; P-128, Sheets 4, 6-7, 21-22; P-130, Sheets 8-9; P-132, Sheets 1-5; P-133, Sheets 3-7; P-151, entire exhibit; P-155, Sheets 6, 15-16, 18; P-156; P-158, entire exhibit; P-159, Sheets 1-3; P-161; P-179; P-214, entire exhibit.

WOODLAWN TRACT.

P-100, Sheets 1, 18; P-102, Sheet 1; P-106, Sheet 5; P-108, Sheets 1-2; P-110, Sheets 1, 15, 16; P-111, Sheets 6, 11, 29; P-112, Sheets 7, 23-49, 50; P-113, Sheets 15, 16, 24, 28-29, 33-34, 35-36, 37; P-115, Sheets 10-11, 22-24; P-116 Sheets 16-22; P-121, Sheets 1-2; P-126, Sheets 8-9; P-128, Sheets 1-3, 5, 8-13; P-129, Sheets 5-7, 12-16, 21-23; P-130, Sheets 11-16; P-152, Sheets 3-4, 6-9, 12-14, 18, 22-23; P-154, Sheets 19-20, 32; P-213; P-215; P-216.

MACKIE TRACT.

P-100, Sheets 7, 11, 17; P-103, Sheets 1, 3-11; P-105, Sheets 8-12, 15-16; P-109, Sheets 17-19, 21-22; P-111, Sheet 31; P-116, Sheets 14-15.

BEAVINS TRACT.

P-78, entire exhibit; P-90, Sheets 1-12; P-104, Sheet 15; P-105, Sheets 1-3.

The record conclusively shows that all these properties were found as excellent purchases by Stricker, and after the purchase under said agreement after Morgan obtained his purchase money back, together with all costs, all remaining, whether it be land and timber or timber alone if timber alone was purchased, *was divided equally between Stricker and Morgan, with the exception of Esperanza Plantation, which is the subject of this suit.*

In every instance Stricker was to and did share equally, share and share alike, with Morgan in the profits and losses on every purchase made pursuant to the original agreement, and after Morgan had recovered all of the purchase price, interest charges, costs and expenses of acquisition, costs and expenses of management, etc., in every instance Morgan did account to Stricker for his full share of profits and ultimately, though in some instances after some considerable number of years delay, did make conveyance to Stricker of Stricker's equity and share in remaining land where land had been purchased, *save only as to the Esperanza Plantation in Concordia Parish, Louisiana.* Morgan did account to Stricker for Stricker's full one-half share of profits in so much of the timber as was sold from Esperanza Plantation to General Box Company in 1947, but thereafter did refuse to accord to Stricker, Stricker's claimed half interest in the remainder of the land, timber and all mineral rights in Esperanza Plantation in Concordia Parish, Louisiana, or to account to him for all other profits therefrom.

Stricker claims the right to accounting, and to an undivided one-half interest in said Esperanza Plantation, based on partnership, joint adventure, constructive trust, and the written instruments, documents, and memoranda, referred to hereinafter.

From the documentary evidence introduced in this case, undisputed by any testimony of witnesses, it is conclusively established that the profit and loss sharing agreement between Stricker and Morgan had its inception in 1935 and continued in force and effect to the time of and after the institution of this suit by Stricker. The lands and property, timber and timberlands, purchased in Louisiana by said parties were purchased, applied, handled and managed and shared in, as to profits and losses, in all respects as were those lands, timber and lands and timbers purchased in and situated in the State of Mississippi. The only exception to this statement of fact is that after the acquisition of the Esperanza Plantation in Concordia Parish, Louisiana, after admission had been made in writing by Morgan that Stricker was a full partner with him in this purchase,[1] and after Stricker had handled the negotiations and execution and delivery of a mineral lease on Esperanza Plantation, demanding that certain special provisions be placed in the lease, being therein interested, when it later appeared that Esperanza would probably become an oil producing area, Morgan sought to devise ways, means and causes to deprive Stricker of his rights to a full share in the profits of the Esperanza purchase. These statements of fact are adequately supported by

[1] See Appendix 2501B, pp. 32, 37, 39.

the record. (R. Vol. 8, pp. 1505-1566, and Exhibits there referred to; R. Vol. 8, pp. 1579-1587; R. Vol. 9, pp. 1628-1639 and Exhibits there referred to; R. Vol. 9, pp. 1639-1644; R. Vol. 9, pp. 1644-1652, and Exhibits referred to therein; R. Vol. 9, pp. 1652-1674, and Exhibits referred to therein; R. Vol. 9, pp. 1674-1674, and Exhibits referred to therein; R. Vol. 9, pp. 1679-1684, and Exhibits referred to therein; R. Vol. 7, pp. 1244-1246, 1311, and Plaintiff's Exhibit 90; R. Vol. 9, p. 1786; R. Vol. 9, pp. 1764-1775, and Exhibits referred to therein; R. Vol. 9, pp. 1779-1781, and Exhibits referred to therein; R. Vol. 8, pp. 1478-1566, 1579-1593; R. Vol. 9, pp. 1628-1691, 1705; R. Vol. 10, pp. 1877, 1878, and Exhibits referred to therein.

It was through Stricker's efforts that Esperanza Plantation was located as a possible purchase by Stricker and Morgan. Stricker had the timber cruised,[2] as at that time Stricker and Morgan were primarily interested in the timber on said plantation. Stricker made a bid in writing for the timber.[3] It developed that the timber could not be purchased separately from the land on terms agreeable to Stricker and Morgan, so the entire plantation was purchased for the sum of $26,500.00, with the title taken in the name of Morgan as in other transactions. This purchase was concluded in January, 1941. The purchase price of said property was paid by Morgan in three checks and on the reverse side of each check it was stated that each respective check represented a portion of the purchase price of Esperanza Plantation.[4]

[2] See Appendix 2504B, pp. 9-14.
[3] See Appendix 2504B, p. 15.

Some few months after January, 1941, the date Esperanza Plantation was purchased in the name of Morgan under the agreement between Stricker and Morgan, John Dale of Vidalia, Louisiana, had a party interested in purchasing Esperanza Plantation and being aware of the fact that initially Morgan and Stricker had been interested primarily in purchasing only the timber on said plantation, addressed the following communication to Morgan dated September 16, 1941:

DALE, DALE & DALE
ATTORNEYS AT LAW
Owners of Abstract Books
VIDALIA, LOUISIANA
September 16, 1941.

John Dale
John Dale, Jr.
L. D. Dale

Mr. J. P. Morgan
Kenner, Louisiana

Dear Mr. Morgan:-

I have a proposition for the purchase of your Esperanza lands, excepting therefrom all timber, and would appreciate your letting me know your best price and terms, allowing a 5% commission for making the sale. (Emphasis added.).

Best personal regards.

Sincerely,

DALE, RICHARDSON & DALE,

(S.) JOHN DALE, JR.,

(John Dale, Jr.).

D2 hwc

(R. Vol. 3, p. 495, Plaintiff's Exhibit No. 34; Appendix VII, p. 57.)

It will be noted Dale in his letter to Morgan proposed to buy only the lands (Esperanza), and not the timber.

On September 23, 1941, only nine months after Stricker and Morgan had purchased the Esperanza tract, Morgan replied to Dale's letter, as follows:

September 23, 1941.

Mr. John Dale, Jr.,
Vidalia, Louisiana.

Dear Sir-

Yours of the 16th caught the writer out of town.

Note you probably have a purchaser for the Esperanza land. We would not mind selling the land with the right to reserve the timber and oil rights. I have information from fairly responsible sources that there may be a possibility of a good oil lease on this land. So if it is just the land you are interested in we would be more than glad to have you offer us the proposition you have and I will take same up with our good friend

Mr. Stricker who is a partner in this buy. (Emphasis added.)

Thanking you for the letter, I am
Yours very truly,
J. P. MORGAN.

JPM/G.

(R. Vol. 3, p. 497, Plaintiff's Exhibit No. 35; Appendix 2504B, p. 37.)

The record conclusively shows Stricker and Morgan were the only two involved in the Esperanza purchase. In plain English in this letter, Morgan admits Stricker owned an interest in the land. The record shows Stricker searched out and found that Esperanza Plantation could be purchased, had the timber cruised, handled all negotiations leading up to the purchase, had the property surveyed, and after the purchase, negotiated a mineral lease on the property.

Again, Charles Barchus who had been the agent for A. H. Campbell, former owner of Esperanza Plantation, wrote Morgan on October 12, 1941 as follows:

> "I was talking to Bob Graham and Jake Laub yesterday, and they told me that if you wanted to let them have Esperanza subject to the timber sale at $5,000.00 they would take it. They would prefer to pay half cash and the balance in one year at 6% but if you prefer cash they will raise the full amount.

"Will appreciate your letting me know at your earliest convenience." (Plaintiff's Ex. 94, p. 1; original sent up; Appendix 2504B, p. 38.)

In reply to the above communication, Morgan wrote Barchus on October 13, 1941 as follows: (Plaintiff's Ex. 94, p. 2; original sent up; Appendix 2504B, p. 39.)

"Yours of the 12th received and note your offer of $5,000.00 for the land.

"*Sorry to state but we have refused yesterday what I would consider a much better offer than this as we do not know just when we are going to be able to take the timber off. Therefore, I think it best for us to own, the land as long as we own the timber.*

"I expected to hear from Mr. Graham in accordance with our verbal agreements that he would rent land from us until we removed the timber, then we would sell land to him. He has said nothing more about it. I think now that would cancel our verbal agreement.

"Thanks just the same for your offer and sorry we are not able to accept it at this time." (Emphasis added.)

It will be noted Morgan, in his reply to Barchus, said, "Therefore, I think it is best for *us to own the land as long as we own the timber.*" In plain English Morgan admits and states in writing that Stricker owns an interest in the land and timber on Esperanza Plantation which Stricker is claiming in this litigation.

A judicial admission was made by counsel for Morgan at the trial in response to a "Request for Admission"

dated March 25, 1957, at which time Morgan's counsel stated:

> "Now then, over in No. 2 again there is a reference to an alleged statement that J. P. Morgan and R. M. Stricker acquired the timber and timber rights in Esperanza Plantation in copartnership and as equal partners. If Your Honor will recall, in the pre-trial conference, the question came up as to what was an issue in this case, and we stated to your Honor, and we will state to your Honor, that there is no controversy as to the timber. It is admitted that J. P. Morgan and R. M. Stricker each owned an undivided one-half interest in the timber." (R. Vol. 4, p. 692.)

and counsel further stated:

> "Now, we repeat to Your Honor that we are willing to admit to No. 3, that R. M. Stricker is now entitled and has been entitled to an undivided one-half interest in the timber on Esperanza Plantation. We still are willing to make that admission. We do say to your Honor that has not been an issue in the case and is not joined as an issue by the Pleadings.
>
> "BY THE COURT: As I understand it, you admit No. 3, but deny a partnership in the ownership, but admit that he owns a half interest in the timber and the timber rights.

"BY MR. BRUNINI: That is correct." (R. Vol. 4, p. 693.)[8]

The judicial admission taken with the letters written to Dale and Barchus by Morgan conclusively show that the Esperanza Plantation was purchased on same basis as the other tracts referred to herein, and that Stricker owned a half interest in the land and timber. Morgan, in his letter said, "Therefore, I think it best for us to own the land as long as we own the timber."

And again under date of October 27, 1941, Barchus wrote Morgan concerning the proposed oil and gas lease on Esperanza Plantation, as follows:

> "I am enclosing herewith a copy of my letter which I wrote you a little over a week ago, the original of which was lost. The agreement with Mr. Campbell is that he will lease for $1.00 per acre and pay a 10% commission which would be $125.00 on his half.
>
> "If this is agreeable to you, I am going right ahead. I understand the well south of Vidalia is down 5,200 feet and broke down. This should be in pay dirt now. Just what effect it is going to have on our buyer I do not know, but I am expecting him in here at the hotel tonight.
>
> "Awaiting your reply, and with personal regards, I am" (Plaintiff's Exhibit 94, p. 4; original sent in: Appendix 2504B. p. 41).

[8] The request for admissions No. 3 (R. Vol. 3, p. 414) states as follows:
"Plaintiff calls upon defendant to admit that R. M. Stricker has at all times been and is now entitled to a one-half interest in the timber and timber rights on Esperanza Plantation in Concordia Parish, Louisiana.

In reply to the foregoing communications, Morgan wrote Barchus by letter of date October 29, 1941 in which he stated:

"Yours of the 27th received, also copy of the 16th which I have never received.

"Also note you are sending us copies of a few letters which you asked us to return. Again sorry to state, we did not receive those letters. All we received was a copy of a letter we were supposed to receive on or about October 18.

"As to leasing the land for oil, I do not know of anyone else paying any more than $1.00 and if we hit oil it will be all right. *If we do not hit oil we will have the $1.00 anyway.*" (Emphasis added.)

"My suggestion to you is to lease *our* part of the mineral rights as I understand *we were to get half and the seller, Mr. Campbell, was to get the other half.*

"I also understand this agreement will go through at once, if so the 10% will be on the first payment only.

"This option is only good for ten days, therefore, you must place this lease on or before November 10 or we reserve the right to refuse or accept any lease after that date.

"I haven't talked this over with anyone else therefore it is strictly up to you.

"*Note what you say about Bob, we have never heard one word from Bob from the time he left us that day until the present time. I have asked Mr. Stricker to see him, but he hasn't had time.*" (Emphasis

added; Plaintiff's Exhibit 94, p. 5; original sent up; Appendix 2504B, p. 42.)

And in the last quoted communications, Morgan's use of the pronouns "we" and "us" and of the possessive plural pronoun "our" referred to Stricker whose name was also mentioned in the letter, as Morgan and Stricker were the only ones at that time having any interest in Esperanza Plantation except for Campbell's reservation of the minerals under the south half of Esperanza which is likewise referred to in that letter.

Following the foregoing communications, Barchus wrote Morgan a letter dated November 1, 1941 in which he stated:

> "I wish to thank you for your letter and want to say that the letter I wrote you enclosing Mr. Campbell's letter and the copy of my letter to Mr. Campbell (a copy of which letter I sent you later) was returned to me yesterday. It had been addressed to you in care of the Louisiana Box Company, 'Kena' Louisiana.
>
> "The party who had agreed to purchase this lease being a Mr. Elliott, turned me down; but I have a client coming in from Shreveport the fore part of this coming week that I am sure will take it. The lease will be made out for $1.00 per acre for the first year, and $1.00 per acre for renewal. I told him the price was $1.00. It will probably be handled by making out the lease and sending it to you for your approval and signature, and I want you to draw a sight draft for the full amount $1,250.00 and when the draft is paid and the papers returned to you, you can send me a check

for $125.00 for the commission." (Plaintiff's Exhibit 94, p. 6; original sent up; Appendix 2505B, p. 43.)

The above reference to the cash consideration of $1.00 per acre or a total of $1,250.00 and Barchus' expected commission of $125.00 being 10% thereof, together with his subsequent advice to Morgan that the lease Esperanza would "finally land in the Magnolia Company" and the fact that the lease on Esperanza ultimately made did "land in the Magnolia Company" established the identity of the $125.00 item shown to have been paid by Morgan to Barchus entered on Morgan's personal ledger sheet No. 74 (Plaintiff's Exhibit 48, original sent up; Appendix 2504B p. 5) and the check stub of Morgan's check to Barchus dated February 16, 1942 in the sum of $125.00 (Plaintiff's Exhibit 181; original sent up) as being commission paid by Morgan to Barchus for services in procuring the oil lease on Esperanza Plantation, and which by Morgan charged as were other items against Esperanza acquisition costs.

The oil lease on Esperanza was finally acquired by Magnolia Petroleum Company in that the lease as ultimately executed was executed to John Dale, Jr. as lessee and was assigned by him to Magnolia. Stricker was instrumental in the negotiation of this lease and in the final closing of it, as we shall now proceed to show.

Regarding the leasing, Morgan wrote Barchus on December 22, 1941, as follows:

"Yours of the 15th caught the writer out of town and note you say you feel that you can still sell the lease. Go ahead and sell it if you can and I

will still put the other fellow off, as *we* are trying to get a different lease from the Mississippi lease on *our* other places.

"Humble wanted to lease a couple of other places that we have down below Natchez, east of the Mississippi River. We are asking $1.00 per acre with $1.00 rental, with a different lease. *I don't know just what Mr. Stricker has in mind when he says 'a different lease' but*, as stated above, if you can lease this at $1.00, let it ride." (Plaintiff's Exhibit 94, page 12; original sent up: Appendix 2504B, p. 49.)

In the statement contained in that letter to the effect that "we are trying to get a different lease than the Mississippi lease on our other places", the reference to the plural pronoun "we" is to Morgan and Stricker obviously, particularly inasmuch as Morgan stated: "I don't know just what Mr. Stricker has in mind when he says 'a different lease' ". This constituted a further acknowledgment in writing by Morgan that Stricker was interested in the Esperanza property which was the property under discussion in the aforesaid letter.

We are enlightened as to "just what Mr. Stricker has in mind when he says 'a different lease' ", by the exchange of correspondence on the subject of the lease of Esperanza to Dale, by him assigned to Magnolia, i.e., Mr. Dale's letter to Stricker of December 31, 1941 and Stricker's notation thereon to Morgan of date January 1, 1942. (Pl. Ex. 37, original sent up: Appendix 2504B, pp. 60-61.)

Stricker was vitally and financially concerned with the terms of this lease which on behalf of himself and

Morgan he was negotiating. This fact was known to Morgan and known to Mr. Dale. Mr. Stricker was endeavoring to *limit liability on the covenant of warranty and to procure more favorable terms if there should be drilled a "shutin gas well"* than the usual (and concededly harsh) provisions whereby for $50.00 for one gas well the entire acreage could be held as "under production" and whereby the lessee would be relieved of payment of the annual $1250.00 delay rentals that would be applicable in Morgan's hands toward reduction of the $26,500.00 cost of the Esperanza property.

It was in recognition of this interest and participation of Stricker that Mr. Dale wrote Stricker, addressing him personally, to the following effect:

> "They also objected to increasing the $50.00 for a gas well for the reason that they say that if it cannot be marketed it is more valueless to them than to *you*, and in view of the fact that they would own 7 8ths under the lease which would be much more injurious to them not to market the gas than to *you*. In other words, they feel that they would be much more interested in marketing the gas than *you* would be and that such payment would only be made in case no market were available . . ." (Emphasis supplied.)

In recognition of their mutual interest in the terms of this lease, Stricker forwarded to Morgan the original of Dale's said letter, with his appended notation thereon, seeking a mutual agreement as to whether the lease should be finally executed and delivered.

It was a recognition of their mutual interest in the subject of this lease and the terms thereof that, on January 5, 1942, over telephone, Morgan gave Stricker authority to sign the lease and made notation of that fact on the original of the letter from Mr. Dale. (Pl. Ex. 37, original sent up.)

It was in recognition of their mutual interest in the subject of this lease that, agreeably to Morgan, Stricker authorized Mr. Dale to pass the lease and that, as requested, Mr. Dale sent Stricker the check for $1250.00 cash consideration made payable to Morgan with his letter to Stricker of date January 9, 1942 (Pl. Ex. 101, original sent up; Appendix 2504B, p. 62) to accord with the agreement between Stricker and Morgan that Morgan should receive all proceeds and profits from properties purchased until Morgan's costs had been paid; thereafter there to be an equal division of profits.

Morgan, though he received the original of Mr. Dale's letter (Pl. Ex. 37, original sent up) and made notations thereon, did not then, nor until years later, question or dispute Stricker's interest in this oil, gas and mineral lease.

The oil lease as finally executed bears date December 29, 1941 (Plaintiff's Exhibit 21, Exhibit S-2 to bill of complaint; R. Vol. 3, pg. 472) *and its terms were negotiated by Stricker with The Magnolia Company as was the final proof of execution of the lease, its delivery and collection* of the cash consideration, as shown by Plaintiff's Exhibits 37, 98 and 101. (Originals sent up).

ARGUMENT.

The record in this cause is replete with evidence showing that throughout their dealings with one another, the Stricker and Morgan contracted with reference to the jurisprudence prevailing in the State of Mississippi, and intended their rights and equities, their liabilities and responsibilities to be governed thereby; that they themselves by their transactions have evidenced the legal principles under which they intended to be governed, and so, whether from time to time they were dealing with property situate in Mississippi or in the State of Louisiana. It is manifest that Stricker and Morgan so intended to deal with regard to the Esperanza Plantation in Concordia Parish, Louisiana.

Even if it should be held that Mississippi law is not controlling herein, yet, under the law of Louisiana, Morgan is entitled to judgment as prayed for under Louisiana authorities hereafter mentioned, including the concepts or doctrine of quasi-contract and equity, acknowledgment, counter-letters, judicial admission, partnership and joint adventure.

(a) Quasi-Contract and Equitable Principles.

Stricker is entitled to all of the relief prayed for by him in this case under the Louisiana jurisprudence and statutory authorities pertaining to quasi-contracts and equitable principles.

The Louisiana Civil Code of 1870 (hereinafter referred to as L. C. C.) expressly provides for quasi-contractual relationships creating obligations which arise from a fact which is personal or relative to him who is bound (L.C.C. Art. 2292). Quasi-contracts are defined in L.C.C. Art. 2293 as follows:

> "Quasi-contracts are the lawful and purely voluntary act of a man, from which these results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties."

The acts giving rise to quasi-contracts are defined in L.C.C. Art. 2294 as follows:

> "All acts, from which there results an obligation without any agreement, in the manner expressed in the preceding article, form quasi-contracts. But there are two principal kinds which give rise to them, to-wit: the transaction of another's business, and the payment of a thing not due."

The above cited codal articles of the Louisiana Civil Code follow the wording of their counterpart in the French Civil Code, which in turn is predicated on Roman Law as set forth by Justinian (24 T.L.R. 141). Under the concept of quasi-contracts, the jurisprudence of Louisiana has firmly established that a partner who contributes capital and industry has a right of action against the other partner for a settlement of affairs (*Viens v. Brickle*, 8 Mart. (O.S.) 11 (1820); *Delamour v. Roger*, 7 La. Ann. 152 (1852); *Malady v. Malady and Caldwell*, 25 La. Ann. 448). The right of recovery in

such instance finds judicial sanction under the concept of equity principles found in L.C.C. Art. 21, which provides as follows:

> "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is made to natural law and reason, or received usages where positive law is silent."

In the case of *Delamour v. Roger*, 7 La. Ann. 152 (1852), the court had for consideration an action for the recovery of an undivided one-half interest in real property. The plaintiff alleged and proved to the satisfaction of the court that she had contributed capital and or toward the acquisition of the immovable property and further, that she had received numerous letters from the defendant in which he acknowledged plaintiff's interest. The Supreme Court applied equitable considerations and awarded judgment in favor of the plaintiff for an undivided one-half interest in the immovable (real) property. The pertinent language of the court is as follows, to-wit:

> "The reasonable effect of article 2804 of the Civil Code, is to render the participator in concubinage incapable of recovering, as a universal partner, one-half of the property acquired, although her labor may have contributed nothing towards its accumulations; but, when her capital and labor has contributed a full share towards the result, equity entitles her to half the property acquired.
>
> "In addition to this, the defendant, in his numerous letters to the plaintiff, speak not only of 'our

commercial house', but of 'our houses', 'our property' and 'our rents', which he anticipates will be sufficient to support them comfortably in retirement in their old age. Some of these letters are sufficiently particular in description, to establish a legal title to certain properties and slaves as between the parties, and even as to third persons, if they had been recorded, and the knowledge that the parties were not man and wife, had been made public.

"The possession of the defendant cannot prevail against the frequent and long continued acknowledgment of joint ownership, based upon so much equity. It amounts to a legal title to half the property, supported by an equitable ownership, and no principle of law or morality requires us to reverse the judgment of the district court."

Similarly, the court in *Malady v. Malady and Caldwell*, 25 La. Ann. 448 (1873), held that where the industry of one is added to the thrift and economy of another so as to enable them to acquire property in the name of only one, then the property so purchased was jointly owned and each party was declared the owner of an undivided one-half interest in the immovable property. The court cited with approval the case of *Delamour v. Roger*, *supra*, and stated:

"—We think she should be allowed to place her capital and industry against the capital and industry of Malady, and that the property purchased during the time they have been living and working together, should be declared property in which they have a joint interest: that the one-half of it

should be decreed to be the property of Malady, and his half thereof be decreed to belong to the community which existed between himself and his wife."

Similarly, the courts have held that a quasi-contract arises when the estate of one has been enriched by the industry of another (*Succ. of Pereuilhet*, 23 La. Ann. 294 (1871), and that such a quasi-contractual relationship entitles the one who has contributed capital and labor to demand a settlement of the affairs and a participation in profits derived therefrom, although the property is immovable and stands in the name of the deceased (*Succ. of Llula*, 44 La. Ann. 61 (1892)).

The above cited cases establish that the Supreme Court of Louisiana has applied equitable consideration and awarded judgment in favor of Plaintiff for an undivided one-half interest in immovable (Real) property as distinguished from other decisions dealing with the specific partnership articles of the Louisiana Civil Code. The Supreme Court of Louisiana has affirmed this line of jurisprudence in the case of *Sparrow v. Sparrow*, 231 La. 966, 93 So. (2d) 232 (1957). In the *Sparrow* case, the plaintiff sought to be declared the owner of a one-half interest in certain realty. The Court found that the plaintiff was precluded from recovery since concubinage was the primary motive of the relationship. However, the Court implied, and one of the judges stated in a dissenting opinion, that, were it not for concubinage being the primary motive of relationship,

plaintiff therein would be entitled to recover. The pertinent language of the Court is as follows:

"(1) There could have been no legal partnership existing between the decedent and Amelia, because their going to live together was for a purpose forbidden by law.

"Plaintiff has cited cases to the effect that where the concubine has made an actual contribution to the assets of the succession, and the concubinage was merely an incident to the parties' living together, the concubine is entitled to recover a part of such assets. They are distinguishable from the present controversy.

"1. In Delamour v. Rogers, 7 La. Ann. 152, the doctrine of equitable ownership was upheld, but there the court found that the concubinage was merely an incident of a business to which the plaintiff concubine had contributed capital.

"2. In Malady v. Malady, 25 La. Ann. 448, the concubine proved that she contributed a large amount of the capital employed to buy real estate, and the property was all bought in her name.

"3. In Lagarde v. Dabon, 155 La. 25, 98 So. 744, this court merely permitted the concubine to recovery money which she had advanced.

"The case of Simpson v. Normand, 51 La. Ann. 1355, 26 So. 266, and authorities therein cited [illegible] the predicate in holding that where the initial motive and purpose for a paramour and concubine together was concubinage, and such relationship continues, the concubine is not entitled to recover assets of the joint entity on the theory of partner-

ship. The syllabus of that case correctly states that:

"'When the taint' (concubinage) exists, it affects fatally, in all its parts, the entire body of the claim.' See also, Viens v. Brickle, 9 Mart. (O.S.) 11; and Succession of Pereuilhet, 23 La. Ann. 294.

"(2) Here no reasonable conclusion can be reached from the evidence, except that the motives and purposes of plaintiff and deceased, from the very beginning, were that of concubinage. Such being the case, we are in duty bound to decide against the plaintiff.

"Judgment affirmed at plaintiff's costs.

"HAMITER, J., dissents with written reasons.

"SIMON, J., dissents.

"HAWTHORNE, J., absent.

"HAMITER, Justice (dissenting)

"Undoubtedly, the contributions made by plaintiff toward the accumulation of the assets in question were rendered in business transactions and enterprises independent of the concubinage relationship. This being true I am of the opinion that she is entitled to a one-half interest in the property acquired in decedent's name. Delamour v. Roger, 7 La. Ann. 152; Malady v. Malady, 25 La. Ann. 448; Prieto v. Succession of Prieto, 165 La. 710, 115 So. 911; Heatwole v. Stansbury, 212 La. 685, 33 So. (2d) 196, annotation at page 1297 of 31 A.L.R. 2d."

Equitable principles have also been applied by the United States Federal Court in a Louisiana case concerning partnership and joint venture. In *Porter v. Cooke*, 58 F.(2d) 1033, 63 F. (2d) 637, 127 F. (2d) 853, the case was before the Fifth Circuit Court of Appeals twice concerning an alleged partnership or joint venture in certain oil property. When the case was first before the Fifth Circuit in 63 F. (2d) 637, the Court held that the pleadings showed an investment of money by plaintiff and reversed the lower court decision and remanded the case. The pertinent language of the Court is as follows:

> "Allegations of the amended bill show that appellants were entitled to equitable relief, whether a partnership relation did or did not exist between them and the individual appellees. Allegations made show that, the individual appellees having been furnished money by the appellants for investment in property in the benefits of the ownership of which the appellants were to share, and moneys so furnished having been used by the individual appellees in acquiring properties referred to, a trust resulted in favor of the appellants. Brainard v. Buck, 184 U. S. 99, 22 S. Ct. 458, 46 L. Ed. 449; Hainesville Oil Co. vs. Beach, 159 La. 615, 105 So. 790. A consequence of such trust was that, within the meaning of the statute (28 USCA Sec. 118) providing for service by publication on absent defendants, the appellants had an equitable claim to the above referred to property which in equity was in part owned by them. Hamilton v. Young (C.C.A.), 285 F. 223. For the enforcement or protection of the alleged equitable claim relief

was grantable under the amended bill's prayer for general relief. Hardin v. Boyd, 113 U.S. 756, 5 S. Ct. 771, 28 L. Ed. 1141. We are of the opinion that the above mentioned rulings were erroneous."

Thereafter certain fact findings were made showing that plaintiffs did not actually have an interest in the enterprise with the defendant. However, the pertinent language of the court is as follows:

127 F.(2d) 857.

"The theory on which the master found for plaintiffs and which plaintiffs press here, that by acquiring leases and properties from Emiet, Cooke and Gay became joint adventurers under an obligation to continuously devote their time and money and talents to the service of the plaintiffs falls flat, with the finding that there was never at any time, any agreement or understanding of any kind that Cooke and Gay or either of them, were or would be joint adventurers with plaintiffs. For, whatever in-law a joint adventurer this case law hybrid of recent origin and undetermined connotation may be, and however difficult to distinguish in particular cases between joint adventures and partnerships, some courts having gone so far as to say that they are subject to the same rules and principles, it is as fundamental to the existence of a joint adventure as it is to the existence of a partnership, that there be a contract between the parties that they are or are to be joint adventurers. As in partnerships whatever the case as to outsiders, as between the members the relationship of joint adventurers is a matter of intent and arises only where they intend and agree

to associate themselves as such. 30 Am. Jur. page 681."

The common law concept of joint adventure has been integrated into the jurisprudence of Louisiana under Article 21 of the Civil Code referred to herein. In Louisiana the relationships of joint adventure does not have to be established by a specific written contract, but can be proven by action of the parties, their correspondence, memoranda, and other writings. *Daspit v. Sinclair Refinery Co.*, 198 La. 9, 6 So(2d) 341, 345; *Pillsbury Mills v. Chehardy*, 231 La. 111, 90 So.(2d) 797. Under these decisions, the contract or agreement may be expressed or implied.

The case of *Thompson v. Walker*, 235 La. 132 103 So (2d) 65, 67 (1958), recently decided by the Supreme Court of Louisiana, bears a marked similarity to the present case before the Court for decision. In that case the Court applied equitable principles and held that even though a tax title was acquired in the name of a bank it was holding title for the tax debtors as evidenced by the way the bank subsequently handled the transaction on its books and records even though there was no written agreement or recorded counter letter between the bank and the tax debtors. The pertinent language of the court is as follows, to-wit:

"The record shows that the bank charged the cost of purchasing the property at the tax sale to the Thompsons, as reflected by the bank statement headed 'Tax Subrogation Account, J. C. Thompson, et al.' wherein, on the day prior to the tax

sale, the Thompson account was debited for $76.95, the exact amount of delinquent taxes due for the year 1931, plus fees and penalties. The account further reflects the bank thereafter continued to charge to the Thompsons the taxes and expenses paid by it in the succeeding years, the bank, according to the sworn statement of its cashier, having 'recovered all of the money which they (it) paid out for taxes.' During all of these years the bank treated the property at all times as belonging to the Thompsons, even accounting to the plaintiff for a sixth of the amount realized from the sale of timber on the property after deducting his proportionate share of the taxes for the years 1935 and 1936.

"From the foregoing it would appear the bank purchased the property at the tax sale for the Thompsons, never intending to acquire title itself, but only to protect its mortgage covering the 5 6ths interest therein. By foreclosing on this mortgage ten years later, the bank not only judicially admitted it was without title to the property, but that its only interest therein was as the holder of the mortgage being foreclosed. Consequently, Walker, as the purchaser at the foreclosure sale, is bound by this judicial admission and cannot now be heard to question the ownership of the seized debtors in and to the property. It necessarily follows that the instrument of July 17, 1943 executed three days later without consideration and without warranty of title, conveyed to Walker only such interest as the bank had after a full disclosure of the facts."

By the record herein it is shown that with reference to the purchase of Esperanza Plantation the parties (Stricker and Morgan) dealt with each other and the subject of that purchase in all respects as they had done in the numerous other instances when they similarly had acquired timber, lands, and lands and timber, in Mississippi in some instances, in Louisiana in others. It would be inequitable to permit Morgan to deprive Stricker of his rights and benefits and to thereby unjustly enrich himself. The contract between them is implied, in the absence of a formal or authenticated contract. This contract under the Louisiana law is termed a "quasi-contract".

By this quasi-contract, as it is established in this record, Stricker and Morgan entered into an agreement between themselves, the terms of which provided that it was the specific intention of Morgan to advance the purchase price for and acquire in his name the Esperanza Plantation lands and timber in consideration for Stricker's contribution of his labor, skill and industry in finding the property, cruising the timber, negotiating for the purchase, the management of the Esperanza Plantation and other services to be endered. The intention to so contract and the consent of the parties has been established by the testimony of witnesses who testified in this cause, and from the letters by Morgan to John Dale, Jr., dated February 12, 1941,[6] and September 23, 1941,[7] and other facts. Stricker has unequivocally shown that Morgan was reimbursed for the purchase

[6] Pl. Ex. 87, R. Vol. 8, pp. 1435-1437.
[7] Pl. Ex. 36, original sent up.

price out of funds and revenue derived from the sale of a portion of the Esperanza timber, but, despite the rquests of petitioner and petitioner's rights thereto, has failed to execute a deed conveying a one-half interest in the Esperanza Plantation to Stricker, all of which constitute a breach of contract effective as of February 10, 1947, when Morgan was reimbursed for the purchase price.

Stricker has further established that Morgan did not simply neglect to execute the conveyance to Stricker through oversight, but Morgan intended to and did in fact on August 18, 1952 execute donations to third parties, who were his relatives and children, for the express purpose of defrauding plaintiff of his interest in Esperanza Plantation.[8]

We submit that Morgan specifically intended to defraud Stricker of his rights in and to the Esperanza land for the reason that Morgan knew that there was a good possibility of oil, gas and mineral operations and production on the said property and Morgan was so advised to that effect.[9] That exhibit is a letter written by Morgan to Barchus Realty Company, Natchez, Mississippi, attention Charles Barchus, dated November 25, 1941, which states:

> "Yours of the 24th received and note what you say about the ten-year lease.
>
> "I have offered this to another party, subject to prior lease. Get your papers in quickly if you pos-

[8] Pl. Ex. 26, being Exhibits 5-7 through S-17 to the bill of complaint, R. Vol. 2, pp. 246-319.
[9] Pl. Ex. 94 (Sheet 9), original sent up.

sibly can, as the other fellow has not said anything to me for a few days. In your last letter you wrote as if it might be a little bit shaky, but my attorney is quite an oil man and he says the proposition looks mighty good up there and said he could lease it almost within a week. Get your papers in quickly if possible then there will be nothing wrong, but if he gets in ahead of you, of course, I expect his to go over. I will write (wait) ten days on you before I will accept anything from him. I will call him on the phone and tell him that I will give you a ten-day option."

The intent of Morgan to defraud Stricker of his rights in and to the Esperanza land is further established by the testimony of George Lacey, who qualified and testified in this cause as a handwriting expert. George Lacey, testified in connection with Pl. Ex. 47 and more particularly with regard to Ledger Sheet 74, a part of Pl. Ex. 47 and Pl. Ex. 48, in connection with a request by Stricker to determine whether or not the top line on Pl. Ex. 48 which reads "J. P. Morgan, Esperanza Timber Land", was a continuous writing. The result of George Lacey's testimony conclusively established that the phrase "Esperanza Timber" was written on Pl. Ex. 48 before the words "J. P. Morgan" and "Land" were added thereto at a later date, although apparently by the same person, but who used a different pen and typ of ink.[10]

Morgan's intent to defraud Stricker of his rights in and to Esperanza Plantation is further shown by refer-

[10] R. Vol. 6, pp. 1038-1051 and exhibits referred to therein.

ence to the exhibits filed in this proceeding, which show that Morgan manifested and put into effect his concerted plan to defraud Stricker as aforesaid, by executing various donations of mineral and royalty interests in, on and under Esperanza Plantation to his children. This intention is further manifested by the altered ledger sheet (Pl. Ex. 48) and change in accounting procedure as evidence by the statement of Louisiana Box & Lumber Company dated December 31, 1943.

(b) Acknowledgment.

Whether or not it be held that Stricker is entitled to the relief by him prayed under applicable jurisprudence of Mississippi hereinbefore discussed or under the principles covering quasi-contracts prevailing in the jurisprudence of Louisiana, yet Stricker is entitled to his relief under the law of Louisiana by reason of Morgan's acknowledgment of Stricker's rights, interest, title and equity.

This right of recovery is established by the acknowledgments contained in the letters, income tax returns and ledgers filed in evidence in this cause.

Stricker has filed in evidence a letter dated September 16, 1941, addressed by John Dale, Jr. to Morgan, wherein John Dale, Jr. inquired of Morgan as follows:

> "I have a proposition for the purchase of your *Espersons lands, excepting therefrom all timber*, and would appreciate your letting me know your

best price and terms, allowing a 5% commission for making the sale."[11] (Emphasis supplied.)

Morgan's reply thereto dated September 23, 1941, has been filed in evidence herein, and states as follows:

"Yours of the 16th caught the writer out of town.

"Note you probably have a purchaser for the *Esperanza land*. We would not mind selling the land with the right to reserve the timber and oil rights. I have information from fairly responsible sources that there may be a possibility of a good oil lease on this land. So if it is just the land you are interested in *we would be more than glad to have you offer us the proposition you have and I will take same up with our good friend Mr. Stricker who is a partner in this buy.*"[12]

The Louisiana jurisprudence is to the effect that letters and parol evidence are admissible to show recognition of rights,[13] and when letters are written at an unsuspicious time they are entitled to great weight.[14] The Louisiana Courts have further held that an acknowledgment by letter amounted to legal title to property supported by an equitable ownership[15] and that such written admissions are as binding as if interrogated on oath[16] and have been found to be proof of an agreement to sell and acceptance[17] and served as a basis for a suit

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[11] Pl. Ex. 31, R. Vol. 3, p. 495.

[12] Pl. Ex. 32, R. Vol. 3, p. [illegible] original sent up.

[13] [illegible] 28 La. Ann. 532 (1876).

[14] [illegible] *Indep. Nat. Life Ins. Co.*, 148 So. 264 (1933).

[15] [illegible] 152 La. 1[illegible].

[16] *Brice v. Abrams*, 12 La. Ann. 783 (1857).

[17] [illegible] 161 La. 378, 108 So. 777 (1926).

for specific performance in confirmation of a verbal agreement to sell.[18]

Of particular importance is the method by which Morgan reported the income derived from the lease bonus and subsequent delay rentals paid under the oil, gas and mineral lease covering the Esperanza Plantation. Frank Byars, a Certified Public Accountant and witness for Stricker in this cause, specifically testified that for the years 1941 through 1944 *only one-half* of the original cash consideration (Lease bonus) and delay rentals were reported on the income tax returns of J. P. Morgan and of his wife and of his son, E. C. Morgan, though the entire amount was shown on Morgan's Ledger Sheet 74 (see Footnote 47, *supra*). By signing the income tax returns for those years, Morgan acknowledged in writing and under oath that the remaining unreported one-half cash bonus and delay rentals was vested in another (who else could it have been but Stricker) and that Stricker therefore has an undivided one-half interest in the Esperanza Plantation, including land and timber. We would refer this Honorable Court to the statement which is contained on the said income tax returns of Morgan, as follows:

> "I we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me us and to the best of my our knowledge and belief is a true, correct and complete return made in good faith for the taxable year stated pursuant to the Internal Revenue Code and the regulations issued under the authority thereof."

[18] *Cerami* v. *Haas*, 195 La. 1048, 197 So. 752 (1940).

That the signing of the income tax returns by Morgan, as aforesaid, constitutes an acknowledgment under oath of Stricker's ownership of an undivided one-half interest in the Esperanza Plantation is substantiated by a recent decision of the Louisiana Supreme Court in the case entitled *Jones v. Jones*, 106 So. (2d) 713 (rehearing denied December 15, 1958). In that case, involving an action for an accounting as to the undivided half interest in an oil and gas lease co-owned by defendant and decedent but held in defendant's name, the court (Chief Justice Fournet as organ of the Court) considered the defendant's answer wherein it was stated that the "—interest so acquired by defendant was owned jointly by him and his brother, in the proportion of a half each, and decedent had so acknowledged by instrument in writing and under oath on May 16, 1950; similarly his wife, the plaintiff, acting individually and on behalf of her husband, had made the same type of acknowledgment in two separate instruments under oath and dated August 1, 1949." Those acknowledgments were made on Form 843 of the Treasury Department, Internal Revenue Service. The pertinent language of the Court is as follows, to-wit:

> "Turning now to plaintiff's contentions on the merits, her arguments do not impress us. The trial judge, defining the relationship between deceased and defendant and rejecting the labels (depository, joint adventurers) sought by opposing counsel to be placed thereon with resulting legal effect, correctly held that '. . . so far as it goes, the parties were co-owners, and as such, since

the property was in defendant's name, he became the agent of the deceased and is bound as such, and is entitled to be reimbursed for any expenditures he made on behalf of or for the account of the decedent.'"

It is submitted that the letters, income tax returns and ledger sheets filed in evidence in this cause constitute an acknowledgment of the agreement and reciprocal obligations existing between Stricker and Morgan herein, and such written admissions are as binding as if interrogated on oath.[19] The effect of the acknowledgment is to grant Stricker a right of action against Morgan on any one of the several alternative grounds under which recovery is sought.

(c) Counter-letters.

As a further alternative ground of recovery Plaintiff cites the many letters, income tax returns (See discussion under acknowledgment, *supra*) and ledger sheets filed in evidence in this cause, and particularly the letters cited hereinabove which constitute counter-letters and acknowledgments by Morgan that Stricker has or is entitled to have vested in him an undivided one-half interest in the Esperanza Plantation, both land and timber. The Louisiana jurisprudence has held that the parol evidence rule, which has been so strongly stressed by counsel for Morgan, was not to be controlling in view of the contents of the counter-letter. In the case of

[19] *Bair v. Abrams*, Footnote 110, supra.

Louis v. Garrison, 64 So. (2d) 254 (La. App. Orl. 1953), the Court stated:

> "The rule of evidence that parol evidence is admissible to show the true consideration not only exists in this State but exists throughout this country. In our jurisprudence it is well settled that the real cause and consideration of a written contract pertaining to immovable property may be shown by any sort of evidence even though the act does not recite a consideration, or expresses a different one. See Dart's New La. Dig. Vol. 7, page 215, Sec. 241.
>
> "The written instrument above quoted, which recognized the rights of defendant to live in 3135 Congress Street after the sale, and which specifically granted them the right to remain there during their natural lives, is in the nature of a counter-letter, as was held by the trial judge.
>
> "The only mention of counter-letters in the LSA-Civil Code is to be found in Article 2239, which recites in part: 'Counter letters can have no effect against creditors or bona fide purchasers; * * * We have searched in vain for any codal or statutory definition of the term. In Karcher v. Karcher, 138 La. 268, 70 So. 228, 229, the Supreme Coudt, quoting Bouvier, defined a counter-letter as:
>
> " 'An agreement to recovery where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument.' Bouvier.

"Both 1 Bouvier's Law Dict., Rawl's Third Revision, page 814, and Black define the word 'defeasance' as an 'instrument which defeats the force or operation of some other deed or of an estate'.

"In the act of sale the vendors set over, abandoned, and delivered, with all legal warranties and with substitution of warranty their ownership of the whole of Lot 8 to the purchaser, Louis, who was present and accepted the transfer and acknowledged delivery and possession of the property.

"When we consider the import of the instrument relied upon by defendants, and also consider the cause of its execution and the purpose which it was intended to fulfill, we think that the document operates as a partial defeasance, as it was calculated to and does defeat or offset the force or operation of the act of sale, which, by its terms, constituted Louis the owner of the property and entitled him to have the full and complete use and possession thereof. The instrument can be classified as a counter-letter, as it defeats Louis' right to demand of defendants the possession of the two rooms occupied by them.

"The document was properly admitted. The rule of evidence relief upon by plaintiff to support his objection as set forth in LSA-C.C. art. 2236, to the effect that the authentic act is full proof of the agreement contained in it as against the contracting parties, does not control in this situation.

"It is the unbroken rule of law in this State that parties to authentic acts, even in the absence of

fraud or error, may assail the verity of the recitals of a deed either by a counter-letter or by the answers of the other party to interrogatories on facts and articles. Incidentally, only in these two ways may the recitals of the authentic act be assailed. Lawrence v. Claiborne, 215 La. 785, 41 So. 2d 680, and cases there cited."

It is not necessary that counter-letters must be executed contemporaneously and at the same time the transaction is closed. In the case of *Morgan v. Hathaway*, 77 So. (2d) 169 (La. App. 1st Cir. 1955), it was stated in a concurring opinion by Judge Cavanaugh as follows:

"I find the following in Volume 17, page 462, Tulane Law Review:

"In a simulated contract there is an apparent expression of the will creating a false belief to the external world and a true representation of the will which remains a secret between the contracting parties. The secret act which is reduced to writing is called a counter letter. Inasmuch as parol evidence cannot be admitted either against or beyond what is contained in an authentic act, the only way in which the verity and reality of an authentic act may be attacked by the parties to the act is: (1) by means of a counter letter, and (2) by the answers of the opposing party to interrogatories on facts and articles. However, this rule of exclusion is not binding on third parties. It is also important to note that this rule applies to movables as well as to immovables.

"Where a counter letter is duly recorded it affects all persons, even creditors, from the time of record-

ing. *An unrecorded counter letter can have no effect except between the parties. But a counter letter is nonetheless effective between the parties because it is under private signature. In order for a document to constitute a counter letter it is not necessary that it should be contemporaneous with the act attacked.* It is sufficient to set aside the act if the writing offered against it, of whatever date, contains an admission that the alleged sale was a simulation. Nor is the plaintiff in such action estopped by any stipulation in the act, or by the warranty contained therein, from proving the falsity of the act. However, where a sale has a real cause it cannot be invalidated by the production of a counter letter. The counter letter is valid against all persons except creditors and bona fide purchasers.

"I believe that the affidavit executed by the plaintiff in this case is in the nature of a counter letter and clearly states that at the time it was executed they had no interest in the property and must be considered as an effective renunciation. Pollock v. Dubin, 46 La. Ann. 906, 15 So. 167." (Emphasis supplied.)

(d) Judicial Admission.

Further, during the course of the trial of this cause, Defendant admitted that Stricker is entitled to and does own an undivided one-half interest in the timber and timber rights on Esperanza Plantation, as will more fully appear from an excerpt of the Transcript of Testimony, as follows, to-wit:

"BY MR. BRUNINI:

"Now we repeat to Your Honor that we are willing to admit to No. 3, that R. M. Stricker is now entitled and has been entitled to an undivided one-half interest in the timber on Esperanza Plantation. We still are willing to make that admission. We do say to your Honor that has not been an issue in the case and is not joined as an issue by the pleadings.

"BY THE COURT:

"As I understand it, you admit No. 3, but deny a partnership in the ownership, but admit that he owns a half interest in the timber and the timber rights.

"BY MR. BRUNINI:

"That is correct."

Under the specific provisions of West's Louisiana Statutes Annotated—Revised Statutes Title 9, Sec. 1103,[21] standing timber is an immovable. The Defendants admit Plaintiff's right, *ab initio*, to an undivided interest in an immovable (timber) in one instance, yet deny Stricker's right to an undivided interest in the land itself, the minerals thereunder the portions of the land that may be presently barren of timber growth, the mineral lease, all of which are likewise classified under Louisiana law as immovables. Morgan precluded himself from denying Stricker's right to a one-half interest in the entirety of the Esperanza Plantation and in the mineral lease and the profits therefrom by admitting that Stricker owns a half interest in the timber

The only way that Stricker could have acquired an interest in the Esperanza timber is by virtue of the agreement pursuant to which the Esperanza Plantation was purchased in the name of Morgan for the benefit of Stricker and Morgan. By admitting that Stricker is entitled to an undivided one-half interest in the Esperanza timber, an immovable, Morgan is precluded from denying Stricker's undivided one-half interest in the Esperanza land and all rights thereto since there was only one agreement pursuant to which the Esperanza Plantation was purchased.

Morgan's right and title does not stem from the admission, but from the original acquisition under the agreement between Stricker and Morgan. The admission is evidence, conclusive, irrebuttable and binding evidence of Stricker's right and title. The rights and title of Stricker are otherwise evidenced the record in this cause, including written admissions of Morgan made long prior to the institution of this suit. The Judicial Admission made in the course of this trial made that evidence conclusive and irrebuttable. As has been shown in the record the acquisition of Esperanza Plantation was effected by one document or instrument—the deed from Campbell—[22] which deed made no separation of title to the timber from the rest of the land (immovable) that was thereby conveyed. Morgan is bound by such a judicial admission.[23]

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[22] Pl. Ex. 20 (Ex. S-1 to Bill of Complaint), R. Vol. 1, p. 181.

[23] *Guilleau v. Guilleau*, 71 So. (2d) 120; 224 La. 837; *Dupit v. Sinclair Refining Co.*, 208 La. 9, 3 So. (2d) 259; *Coleman v. [illegible]*, 131 La. 803, 60 So. 213; *Beard v. Vincent*, 171 La. 869, 111 So. 862; *Scottish Union & National Insurance Co. v. Warren Gro[illegible]*, 50 So.2d

Although the Louisiana jurisprudence is to the effect that timber may be separated in ownership from the land either by way of a timber sale or sale with a reservation of the timber,[24] in the present case, the act of sale covering the Esperanza Plantation by A. H. Campbell dated December 30, 1940, did not separate the ownership of the land from the timber. The Esperanza Plantation was sold as an entirety, as more fully appears by reference to the exhibits on file in this cause, particularly the three separate checks that were given in payment for the Esperanza Plantation purchase, wherein it was noted by an endorsement of purpose of the back of each check that the Esperanza Plantation was acquired as an entity without separation of the land from the timber.

By virtue of Defendant's Judicial Admission, Stricker is entitled to all of the relief prayed.

Counsel for Morgan at the trial in response to a "Request for Admission" admitted for the record that J. P. Morgan and R. M. Stricker each own an undivided one-half interest in the timber on Esperanza Plantation (see page 22 of this Petition). This judicial admission that Stricker owned an undivided one-half interest in the timber on Esperanza Plantation was without limitation. Notwithstanding this fact, the District Court held that Stricker owned an undivided one-half interest in the timber on Esperanza Plantation that was in being

[24] *Eugenia v. Crowell, Long Leaf Co.*, 20 So. (2d) 641 (1945); *Cooley v. Meridian Lumber Co.*, 195 La. 631, 197 So. 255, 260 (1940); *Gray v. Edgar Lumber Co.*, 138 La. 906, 70 So. 877 (1916).

on the date of the purchase in January of 1941. There is not one scintilla of evidence in this record to justify such a conclusion and, to the contrary, it is in direct conflict with the judicial admission referred to herein.

BID OF LOUISIANA BOX AND LUMBER COMPANY (MORGAN'S COMPANY) FOR TIMBER ON ESPERANZA PLANTATION.

The Court of Appeals, in commenting on the findings of the District Court, said: "From all of this evidence the court reached the definite conclusion that the Esperanza deal was separate from all the others, that the timber was purchased funds of Louisiana Box and Lumber Company and was held by defendant for the joint benefit of plaintiff (Stricker) and said company, that the land was purchased by defendant, and that plaintiff acquired no interest therein; and that the oil, gas and mineral rights, being a part of the estate in the land itself, were the property of the defendant free from any claim of the plaintiff."

This finding is contrary to the evidence in the case. When Stricker and Morgan concluded to sell the timber on Esperanza Plantation in 1947, the same Louisiana Box and Lumber Company that the Court said owned the timber on Esperanza submitted a bid to Morgan and Stricker for the timber, which bid was in competition with the bid submitted by General Box Company of Natchez, Mississippi.

The bid of said Louisiana Box and Lumber Company is as follows:

"Kenner,
Louisiana.
Januarry, 14th, 1947

"Messers. J. P. Morgan and R. M. Stricker.
Woodville, Miss.
C O A. H. Jones's Office.

"My Dear Sirs;-

"We wish to offer, the sum of Eighty thousand Dollars, for any and all timber; which when cut during a term of five, years from date, will measure across the stump, 14 inches in diameter and up, which timber, is now standing and being upon the Esperanza Plantation and now owned by you.

"Very truly, Yours.
"Louisiana, Box and *Loumber*, Co.
"by. *s/ Catherine M. Gonzales.*

(Plaintiff's Exhibit 118; Appendix VII. p. 58.)

ALTERATION OF THE RECORDS.

It was established by handwriting experts that the record shows that Miss Catherine Gonzales, Morgan's secretary, acting pursuant to instructions from Morgan, changed the caption of the ledger sheets and made out new ledger sheets in an effort to show that Louisiana Box and Lumber Company had bought the timber and that Morgan had bought the land of Esperanza separately and to otherwise "alter the picture" on Morgan's

records; and all of the evidence indicated that this was done subsequent to the sale of timber to General Box Company and about the time of discovery of oil in the vicinity of Esperanza and that such was done without the knowledge of Stricker.

STRICKER'S INTEREST DISCLOSED BY PIPE LINE RIGHT-OF-WAY GRANTS AND RECEIPTS FOR LAND DAMAGES.

The fact that Stricker at all times claimed an interest in the land and his rights were admitted by Morgan were disclosed by the several right-of-way grants that each Morgan and Stricker executed to oil pipe line companies and their receipts for damages not only to timber but to land as well. (Plaintiff's Exhibits 25, 24, 158 (Sheet 15), 158 (Sheet 4), 27, 158 (Sheet 2), 158 (Sheet 6), 158 (Sheet 8), Appendix 2504B, pages 97, 100, 101, 103, 104, 105).

SUPERVISION OF ESPERANZA PLANTATION BY STRICKER FOR ACCOUNT OF STRICKER AND MORGAN.

From the date Esperanza Plantation was purchased to the date this suit was filed, the record shows Stricker continued to supervise activities on Esperanza for the account of Stricker and Morgan. He had surveys made for which he paid one-half, attended to proper location of tank batteries for the production of oil on the property, advised with Morgan from time to time concerning the property, and Morgan, according to witness for Defendant, Hunter Jones, said that Morgan stated to him in 1952 that any trade Jones made respecting the loca-

tion of tank batteries and well sites on Esperanza would be approved by Morgan.

Morgan and Stricker together inspected the Esperanza property as late as 1952.

Stricker and Morgan sold part of the timber on Esperanza Plantation in 1947. Competitive bids for the timber were requested by Stricker and Morgan, and Morgan's company (Louisiana Box and Lumber Company) submitted a bid to Stricker and Morgan for the timber as did General Box Company, of Natchez, Mississippi. General Box Company was the successful bidder. The proceeds from the sale of the timber, after the deduction of Morgan's costs, were divided between Stricker and Morgan equally.

It was not until 1947, after the sale of the said timber and receipt of the bonus and rentals from the oil and gas lease that Stricker was entitled to recover his interest in the land.

After oil development became eminent in 1944, Stricker and Morgan corresponded for the first time with respect to the issues involved in this suit, and at no time did Morgan take a positive position that he would attempt to deprive Stricker of his interest in the land, but left the matter for negotiation, and it was not until after the suit was filed that Morgan took a definite stand in this regard.

There is no evidence in the record whereby Stricker disclaims his interest in the land.

The following findings of the District Court, sanctioned by the Court of Appeal in its opinion, have no factual support in the record, and, indeed, are contrary to the positive evidence in the record established by correspondence, letters, memoranda, checks, and other writings, and the action of the Court of Appeals in sanctioning these findings has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision:

a. "Plaintiff knew and understood that he had no interest in Esperanza Plantation beyond the participation in the profits from the sale of the timber".

b. "In all his dealings with defendant, Plaintiff conducted himself as a broker or middle man—"

c. "Plaintiff knew and understood from the date of the purchase of the Esperanza Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber—"

d. "Defendant has been in full, open possession of the Esperanza Plantation since December 30, 1940 and has exercised all instance of ownership in connection with the Esperanza and from that date".

e. Many many "findings of fact" contained in the opinion of the District Court which by the affirming opinion of the Court of Appeals were sanctioned despite lack of evidence to support some and despite the fact that such findings were contrary to the record evidence.

Further, it is submitted an examination of this record will disclose that the evidence consists of documents, records of account, accountings, exchanges of communications, and other writings, and petitioner's case does not depend in whole or in part upon the testimony of witnesses. There is no array of witnesses disputing one another, so the statement by the Court of Appeals, that the District Court was in a better position to judge the witnesses has no application whatsoever in this litigation. The case is based entirely on written evidence.

As stated herein, the opinion of the District Court and the Court of Appeals, particularly the findings of the District Court, are not supported by the documentary evidence in this case, and to the contrary, do violence to the documentary evidence introduced, particularly, but not exclusively, the written admissions and acknowledgments of the said Morgan, which admissions of the said Morgan conclusively show Stricker owned an undivided one-half interest in Esperanza Plantation as he did all other transactions between Stricker and Morgan.

To permit the opinion of the Circuit Court of Appeals to stand is a gross miscarriage of justice, is contrary to the established principles of Louisiana jurisprudence as set out herein, and does violence to the undisputable written evidence constituting this record.

The opinion of the District Court and the Court of Appeals is contrary to the law of the State of Louisiana

as established by the decisions of Louisiana Supreme Court, set out herein, and for the Court of Appeals to sanction such action on the part of the District Court, we submit, with respect, is cause for the exercise of this Court's power of supervision.

WHEREFORE, it is submitted that a writ of certiorari should be granted herein.

Respectfully submitted,

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FILED
DEC 28 1959
JAMES R. BROWNING, Clerk

APPENDICES I. II. III. IV. V. VI.

Supreme Court of the United States

OCTOBER TERM, 1959

No. 614

R. M. STRICKER,

Petitioner

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased),

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX I

OPINION

(Title omitted—filed January 23, 1958)

This lawsuit was filed by the plaintiff against the defendant on the 15th of October, 1955 and arises out of the purchase of the Esperance Plantation, which is located in Concordia Parish, Louisiana, and was purchased by J. P. Morgan, the defendant, on or about the 30th of December, 1940. The plaintiff filed his complaint contending that he and the defendant, Morgan, had entered into a partnership agreement on or about November, 1935 for the purpose of engaging in buying and selling lands and timber, and that the plaintiff would furnish his knowledge of the value of timber and timber lands and the defendant would advance the money for the purchase of the timber and land, and that when the timber was sold and the defendant was reimbursed for the advances, that then the plaintiff and defendant would own the land as partners and would share the profits in all of their deals. He further alleged that if he was mistaken in this, that then they were engaged in joint ventures and that on the same reasoning and facts, he was entitled to a half interest in the Esperance Plantation. And, thirdly, that if he was mistaken in this contention, then that there was a resulting trust in that there was an agreement that the land would be owned by the plaintiff and defendant and the title would be taken in defendant's name, and when the advances made by the defendant had been repaid a conveyance would be made by the defendant to the plaintiff for a one-half interest

in the property; that in accord with that agreement the land was purchased and taken in the name of the defendant, but that defendant declined and refused to convey the one-half interest to him. The defendant answered the complaint and denied these allegations and denied that there was ever any partnership; he denied that there was any resulting trust, and denied that there was any joint venture in which he had agreed to convey to the plaintiff a one-half interest in the property.

The plaintiff undertook to prove the allegations of his complaint by the records of the defendant and of himself, and of the Louisiana Box Company, and by a vast amount of correspondence between plaintiff and defendant beginning as far back probably as 1935 and extending up through 1955, and plaintiff contends that from all of this record testimony and circumstantial evidence, the conduct of the defendant and statements against interest made by the defendant, that the plaintiff is entitled to a judgment. The defendant denies all of the allegations and introduces a large number of exhibits containing statements against the interest of the plaintiff, made by the plaintiff, and also documentary evidence to the effect that the defendant had denied at all times that plaintiff owned any interest in the property other than in the timber, and also pleads laches and contends that as a matter of law the plaintiff could not recover anything because a partnership for the ownership of land cannot be formed under the laws of the state of Louisiana except in writing and that the same law is applicable to a joint venture.

The only controversy in the present case is with reference to the Esperance land, which is located in the state of Louisiana, in Concordia Parish. The plaintiff sought to be declared the owner of a one-half interest in the proceeds and revenues resulting from the sale of oil leases and sought an accounting from the defendants and that he, the plaintiff, be declared the owner of an undivided one-half interest in the Esperance land and the owner of a one-half interest in all the oil royalties, bonuses and rentals accruing to and derived from all the oil, gas and mineral leases affecting and pertaining to the Esperance property located as aforesaid. There is no controversy about the timber on Esperance Plantation as the defendant, from the beginning, has recognized this ownership.

The burden of proof is upon the plaintiff to establish his cause of action by a preponderance of the evidence and in this the plaintiff has failed, and his complaint will be dismissed for the reason that he has not met the burden of proof in establishing that there was a partnership agreement with reference to the purchase of the Esperance Plantation; and, second, as a matter of law, under the law of Louisiana a partnership for the purchase and sale of lands cannot be formed unless in writing, and in the present case it is admitted that there was no written agreement.

The record is very lengthy as it involves dealings between the plaintiff and defendant extending back as far as 1922 at which time, in 1922, the defendant was engaged in the lumber business and manufacturing boxes, and was the substantial owner of the Louisiana Box Company. The plaintiff was a skilled timber man and as early as 1922 was selling logs to the de-

fendant. The defendant prior to 1922, and before he purchased the Louisiana Box & Lumber Company, had worked for it and on the death of the owner, along about 1922, the defendant acquired that business, which was located at Kenner, Louisiana. It was engaged in the manufacture of boxes and packing crates and in such business used large amounts of cottonwood and willow, which were found in abundance along the Mississippi River. The defendant operated that business as a corporation until 1939, when it was dissolved and a partnership was formed between the defendant, his son, Edward C. Morgan, and Fred N. Owen, who was the bookkeeper for Louisiana Box & Lumber Company and presently, and up until this date, employed by the defendant. The defendant was engaged in other types of business and investments and maintained a set of records separate and apart from the Louisiana Box & Lumber Company, in which he recorded the transactions of his other interests. Miss Catherine Gonzales, who testified in the case, was employed about 1938 as personal secretary to the defendant and with the responsibility of keeping the personal records of the defendant.

The plaintiff had a wide experience with timber located along the Mississippi River, both in Mississippi and in Louisiana, and engaged in a large number of purchase and sales of timber and lands on the East and West banks of the Mississippi River, and with a large number of different parties, having been engaged in this business continuously from sometime prior to 1922 up until the present time. These transactions with other people were scattered throughout Louisiana and Mississippi and he had had some ten or twelve transactions with the defendant Morgan since the year 1930. The only one involved herein, as aforesaid, is the Es-

perance Plantation, but there was introduced into the record transactions and dealings between the plaintiff and the defendant which indicate, along with his dealings with others, that he might be classified to a large extent as a timber broker, or, as he, himself, sometimes expressed it, as a "middle man" in these transactions.

The plaintiff alleges in his complaint certain transactions between plaintiff and defendant involving timber and timber lands about which there is no controversy. These transactions were alleged and introduced in evidence in plaintiff's effort to establish that there was a partnership. One transaction was that of the Walnut Grove Plantation located in Wilkinson County, Mississippi, involving land and timber, and was made November 16, 1935. Another one was the McKellar transaction, wherein the timber located in Wilkinson County, Mississippi was purchased on July 20, 1936. The next one was the Dr. Loeb or Cat Island timber located in West Feliciana Parish and was purchased October 8, 1937. Another transaction was Artonish Plantation, located in Wilkinson County, Mississippi and involving the land and timber and was purchased December 29, 1939. Another was the Stockett lands, located in Wilkinson County, Mississippi and involving the land and timber, which was purchased January 18, 1940. The next one was the Woodlawn Plantation, located in Wilkinson County, Mississippi, purchased December 10, 1941 and involving land and timber. Another was the Mackie timber tract, located in West Feliciana Parish and was purchased April 4, 1942. The next one was the McKellar land, involving the land and remaining timber located in Wilkin-

son County, Mississippi and dated February 6, 1943. The plaintiff, in this particular transaction, refused to go into the deal because he did not like some of the other parties who were in it. The next one was the Point Breeze timber in Concordia Parish, purchased July 19, 1944, and involving the timber only. These transactions above mentioned will be referred to later in this opinion and slightly more in detail.

The next transaction, and the one here in controversy, is the Esperance Plantation, located in Concordia Parish, Louisiana, and the purchase was made December 30, 1940. It had formerly been owned by one Campbell, who lives in Memphis, and the sale of the Esperance Plantation from A. H. Campbell to the defendant, J. P. Morgan, was handled by Honorable John Dale; one of the attorneys for the plaintiff in the present case, who at that time was representing A. H. Campbell. This transaction happened sometime the latter part of December, 1940 and oral testimony was offered as to what transpired, but the time has been so long that the memories of witnesses were bad as to what actually happened. One witness, Graham, testified that the defendant said to the plaintiff, "Mason, let's you and I buy it", but that is contradicted by his own statement and also by the failure of anyone else to hear the conversation, even though he admits that it took place in the room where Mr. Dale was. I, therefore, will have to decline to give any weight to the testimony of Graham, even if it should be competent, as his memory is entirely vague and he is contradicted by other witnesses.

The purchase of the Esperance Plantation came about in this way, and it is important to go somewhat into detail as to the manner it was acquired for the reason that it is the contention of the plaintiff that other transactions hereinbefore referred to and hereinafter to be referred to would afford an inference that the purchase of Esperance was under similar circumstances. However, as a matter of fact, it was different. Esperance was owned by A. H. Campbell of Memphis, who had it up for sale for the total consideration of $26,500, subject to the exception and reservation unto himself of all the minerals in the South Half thereof. Morgan and Stricker were interested in the purchase of the timber only and had no thought at that time of buying the land. Charles H. Barchus a real estate agent of Natchez was the real estate agent negotiating for the sale of the property. Honorable John Dale, Jr., of Vidalia, Louisiana was the attorney for Mr. Campbell in these transactions, which transactions later consummated in the sale of the entire tract to defendant, Morgan, but Morgan and Stricker, in conformity to prior transactions, had an understanding between themselves that Stricker would acquire a half interest in the timber. Plaintiff, Stricker, procured an estimate to be made of the standing timber on the entire tract and he and Morgan thereafter became very much interested in buying the timber. Thereupon Stricker made a written proposal to Barchus to purchase the standing timber on Esperance, with five years to cut and remove the same, at and for the sum of $21,000.00 in cash, and this proposal was made on behalf of Stricker and Morgan. The offer was dated December 18, 1940, the timber estimate having been completed on December 9, 1940.

and the cost of the estimate, which was made by estimators Roberts and Wheeler was paid by checks of Stricker on the Commercial Bank of Woodville.

J. S. Laub of Natchez and R. A. Graham of Concordia Parish desired to purchase the Esperance Plantation for cattle raising purposes and they agreed between themselves that Laub was to finance the purchase of the property, but subject to the sale of the timber thereon, and that title would be taken in the name of Laub, with the understanding that when Laub should have received reimbursement from funds arising from cattle sales, a half interest in the property would be conveyed to Graham, and they would operate together. This was with the understanding that Graham would handle the cattle raising operation on the property for the benefit of himself and Laub. (Stricker and Morgan were not interested in this.) There were others interested in the purchase of the timber, including J. M. Jones of the J. M. Jones Lumber Company, but Jones was not the high bidder for the timber, though on the first draft of instruments he was named as the prospective purchaser of the timber on Esperance. It was the understanding of Laub and Graham that they would buy the place, but before the sale was consummated they would have a sale for the timber and from the proceeds of the sale of the timber would pay the consideration to Campbell. Initially documents were drafted and submitted to the owner, Campbell, whereby Campbell would make a separate conveyance of the standing timber (and, as that instrument was drafted, the proposed purchaser was J. M. Jones). A separate instrument of conveyance of the Esperance Plantation was made, subject to the prior sale of the timber thereon, with

five years to cut and remove the same, to J. S. Laub, with the reservation in Campbell of the mineral rights on the South Half of the property. Campbell declined to execute two instruments and by letter advised his attorney, Mr. Dale, that he would make only one deed and that the purchaser of the entire property could make a separate conveyance of the timber if he desired. Under this arrangement Campbell was willing to carry $2,500.00 of the purchase price for a deferred payment and would waive a vendor's lien on the timber as to the deferred payment of that amount.

Accordingly, one instrument was prepared by the attorney, Dale, to convey the entire Esperance Plantation tract, subject to the aforesaid mineral reservation as to the South Half, to J. S. Laub, with the understanding that the total purchase price would be $26,500, of which all was to be paid cash on delivery of the deed, except $2,500.00 would be deferred. Dale also prepared a separate timber deed to be executed by Laub, but in the draft thereof the name of the grantee was left blank. At that time Dale did not know in whose name title to the timber would be taken. At that time and under that arrangement it was understood that Stricker and Morgan were to buy the timber and pay $21,500.00 for it and would have five years within which to cut and remove the timber; that Morgan would put up the money, $21,500.00, and the attorneys' fees and expenses, recording fees, etc., and title to the Timber taken in his name. It has been anticipated that the transaction would be concluded during December, 1940, but when execution of two instruments by Campbell was not approved by him, the revised instruments could not be prepared in time to

conclude the matter during 1940, but Attorney Dale advised Campbell that the instruments could be dated as of a date in December, 1940, and accordingly the instruments were so prepared of that date as written therein.

About January 9, 1941 all the parties, that is J. S. Laub, R. A. Graham, J. P. Morgan, R. M. Stricker and John Dale, Jr. attorney, met in the office of Dale at Vidalia to conclude the purchase of the property from Campbell under the aforesaid arrangement. Also present in the office were Fred N. Owen, who was the bookkeeper for Mr. Morgan and a partner in the business of Louisiana Box & Lumber Company, and Charles Barchus. At this meeting a disagreement developed as between Laub on the one part and Stricker and Morgan on the other part as to the time in which Morgan and Stricker should cut and remove the timber from the Esperance Plantation. Laub was insisting that he would allow only two years to Morgan and Stricker in which to cut and remove the timber. This property is located on the Mississippi River and much of the timber is rafted down the river and due to the fact that sometimes the river would not be sufficiently high to remove it all Morgan and Stricker would not agree to the two year limitation, but insisted and demanded that the period of five-years be allowed. Laub and Graham could not go through with the purchase unless Morgan and Stricker acquired the timber, and since they could not agree upon the time limit, the transaction as arranged was abandoned. Campbell was adamant and would not sell the timber without selling the entire plantation. Stricker and Morgan, therefore, could not acquire the timber unless other arrangements were made.

The Esperance tract comprised a total of 2,500 acres, more or less, and Morgan and Stricker were interested only in the purchase of the timber, but Morgan agreed to purchase the entire tract, land, timber, and all, from Campbell for the price of $26,500.00 and recognize a one-half interest in the timber in Stricker. In other words, Morgan substituted himself in the place of Laub and Graham and thereby acquired the land himself and he and Stricker acquired the timber. Attorney Dale was thereupon instructed and requested to procure another deed from Campbell conveying the entire property unto the defendant, Morgan, for a total consideration of $26,500.00, all to be paid in cash. Dale did this, forwarded the deed to Campbell, which he executed and on or about January 9, 1941 the transaction was consummated. The consideration was paid by three checks, one drawn on the National Bank & Trust Company of New Orleans in the name of the Louisiana Box & Lumber Company and signed by Fred N. Owen, made payable to the order of John Dale, Jr., in the amount of $2,500.00, which check bore the following indorsement on the back: "Part payment in the purchase of Esperance Plantation in Concordia Parish, Louisiana from A. H. Campbell, Memphis, Tennessee." Another check was in the handwriting of Fred N. Owen, but at the direction of Morgan, and made out on Louisiana Box & Lumber Company form, and was signed by Fred N. Owen, payable to the order of John Dale, Jr., in the sum of $19,000.00, on the Whitney National Bank of New Orleans, with the following indorsement on the back: "Part and final consideration and payment on the purchase of Esperance Plantation in Concordia Parish, Louisiana from A. H. Campbell, Memphis, Ten-

nessee." The third check was for $5,000.00, made out in the handwriting of Fred N. Owen, was on the Commercial Bank of Woodville, Mississippi, signed by J. P. Morgan, and the indorsement on the back of the check was: "Part and final consideration and payment in the purchase of Esperance Plantation in Concordia Parish, Louisiana from A. H. Campbell, Memphis, Tennessee." These checks were left with John Dale, Jr., to complete the purchase of the Esperance Plantation whenever the deed was received from A. H. Campbell, properly executed and delivered to J. P. Morgan. This was done about January 15, 1941 and was delivered by Attorney Dale to defendant, Morgan, by letter of date January 15, 1941, copy of which letter was transmitted to Mr. Stricker and a copy to Acland Jones, an attorney of Woodville, Mississippi.

As hereinbefore stated, the case was developed to a large extent by documents, correspondence, books of accounts and other circumstances, as well as some oral testimony as to what happened in the office of John Dale when Laub and Graham abandoned their transaction. Stricker nor Morgan, either one, could testify in the case, due to the fact that Morgan is insane and the statute of Mississippi makes the testimony of Stricker inadmissible under those circumstances. Prior to the time Morgan became insane his attorneys served notice on attorneys for plaintiff that they would take the deposition of R. M. Stricker and of John Dale, one of the attorneys for Stricker, on March 14, 1956, and in accord with that notice these depositions, pursuant thereto, were taken on March 23, 1956 for discovery purposes. On August 11, 1956 the plaintiff served notice on attorneys for the defend-

ant that they would take the deposition of Morgan on August 23, 1956. However, after serving that notice and prior to taking the deposition an affidavit was filed on August 16, 1956 from Morgan's attending physician, advising that he was non compos mentis, and thereafter, on November 20, 1956, he was legally and judicially adjudicated to be non compos mentis by a judgment of the Twenty-fourth Judicial District from Jefferson Parish of Louisiana, and on proper motion, and before trial of the case herein, Mrs. Margaret L. Miller Morgan was appointed cutratrix and substituted as party defendant in this case. When the trial started in the present case plaintiff, Stricker, was offered as a witness and upon objection of the defendant to his testimony and after argument, the Court sustained the objection and held that Stricker was prohibited by the statute from testifying. Counsel for plaintiff thereupon requested time in which to further prepare his case, which the Court granted and gave counsel for the plaintiff an opportunity to contest the mental condition of defendant, Morgan. Counsel for plaintiff made a complete investigation and satisfied himself that Morgan was non compos mentis, made no objection on that ground, but contended that Stricker was a competent witness. Section 1690 of the Code of 1942 of Mississippi, generally known as the "Dear Man's Statute," prohibits anyone from testifying to prove his claim against a deceased person to anything that happened prior to the date of the death of such person, and this statute includes not only those who have died, but anyone who is non compos mentis. Counsel for plaintiff contends that by taking the discovery deposition of the plaintiff, Stricker, at a time when the defendant, Morgan, was sane; that the priv-

ilege was thereby waived, but cites no applicable authorities to sustain that position. The case of Veazey v. Turnipseed (Miss.) 69 So. (2d) 379, disposes of that contention. If counsel for defendant had introduced the discovery deposition in advance of the lawsuit it is possible that he would have waived the privilege, but not having used it in any way in the trial of the case on its merits, he did not waive the priv[illegible]

The transaction for the land was carried in the personal ledger of the defendant, Morgan, and separate and apart from the timber deal. As early as December, 1941 an oil, gas and mineral lease was executed by the defendant, Morgan, and he received the bonus, delay rentals and royalties from this lease and they were recorded in his personal ledger. The plaintiff, so far as the record shows, made no immediate claim on Morgan as to any interest in the land, but along about 1944 or 1945 he began to assert a claim to a one-half interest in the land. At that time, in 1945, the defendant, Morgan, definitely advised the plaintiff that he, plaintiff, had no interest whatever in the land. This was done by letter of January 20, 1945 from the defendant to the plaintiff. With this knowledge, the plaintiff took no action until 1955, when this suit was filed.

As hereinbefore stated, there were some ten, eleven or twelve transactions between the defendant, Morgan, and the plaintiff, Strieker, some of which were between them alone, and others involved third persons. Each of these transactions was separate and distinct from the other, was based upon a separate understanding, and there was a balancing of the accounts

between the plaintiff and defendant from time to time, with the gains made from one transaction being used to satisfy an indebtedness originating from a different one. No partnership books were set up or kept as such, but each, the plaintiff and the defendant, kept his own individual set of books with reference to the dealings between them, as well as with reference to dealings between each of them and disconnected individuals. Each of the transactions was gone into in detail and at great length for the purpose of undertaking to prove that a partnership existed, but these other transactions varied in many respects and indicate—and the fair inference is—that each one was based upon an agreement made at the particular time of acquiring the timber or the timber and the land. Of course, in several instances only timber was acquired, in some instances the timber and the land were acquired, in other instances a third party was taken in, and in one instance the plaintiff declined to go into a transaction for the reason that he disliked a third party who was involved in it.

[illegible]he Walnut Grove or Gack property was initially purchased the amounts paid by Morgan on account of the purchase price were handled in this way: There was a draft by Stricker and Berry drawn on the Louisiana Box & Lumber Company for $7,500.00; this draft on the Louisiana Box & Lumber Company was taken up by the personal check of Morgan, which $7,500.00, supplemented by the $2,500.00 paid by one Ransome on an option to purchase timber on that tract, made up the initial cash payment for the property and Morgan gave his note for $15,000.00 to cover the balance of the purchase price. This $15,000.00 was

subsequently paid by personal check of Morgan on the Whitney National Bank for $13,225.00, the balance of the purchase price being paid from cash receipts from timber and property sold off of this tract.

The purchase of the McKellar timber was for $49,000.00 and was handled in a different manner. In the purchase of the Bramlette timber the vendor was paid the consideration by check of the Louisiana Box & Lumber Company on the Whitney National Bank in the sum of $23,500.00 and on the records of the Louisiana Box & Lumber Company this expenditure was charged to logs, was entered in Morgan's personal records and thereafter carried on his ledger as a charge which he was entitled to be repaid out of the property and against which receipts from the property were credited. The Artonish Plantation was a purchase of land including the timber, the consideration was paid by the personal check of J. P. Morgan and the amounts were entered as debits on Morgan's personal ledger, as were the interest charges, attorneys' fees and other charges; and on the credit side of the ledger were entered proceeds of sale of logs from Artonish to the Louisiana Box & Lumber Company.

I shall not undertake to detail these various transactions in other tracts, as they are disclosed without much dispute in the record. There was one transaction wherein a third party, Berry, was interested, and another transaction wherein a third party, Wax, was interested, and in which there was a partnership between Wax and Stricker in some farming interests, but completely disconnected from ownership of land or timber. It was in the Walnut Grove tract,

also known as the Gack tract, that Berry was interested. Stricker and Berry acquired title from the former owners of the property and placed the title in Morgan as to the land and timber in 1935, and except for $2,500.00 procured from W. A. Ransome Lumber Company on option for certain sizes and species of the timber, the purchase price was paid by Morgan. Out of the sales of the timber and some tracts of land from that property all the costs, charges and interest had been repaid to Morgan by May 11, 1936. In the meantime Berry having died, Stricker and Morgan acquired his interest in the property for the agreed consideration, which was paid by Morgan to Berry's widow. In 1944 Morgan conveyed to Stricker a half interest in the Gack tract and, so far as the record shows, they still own a half interest in that tract.

The fair inference from all of this testimony is that each transaction was separate and distinct within itself and was based upon an understanding between Stricker and Morgan, and if third parties were included, on the understanding with them, and contracted only as to that particular transaction. The mere fact that they acquired real estate together and from the sale of it made a profit and divided the gains does not make them partners in the business, even if oral testimony were admitted to prove the partnership with reference to the ownership of land. Plaintiff and defendant each was an experienced business man, Stricker experienced in the timber business and Morgan experienced in the manufacturing business and other commercial lines. Morgan depended, to a large extent, on Stricker to locate timber

tracts for his business and would either pay him a commission for the purchase and handling of the timber or, if there was a gain on the sale of timber, would divide the gain with him. Taking all the testimony as a whole, it is far from proving any partnership between the two men. While it is true that there are several statements against interest made by Morgan, wherein he referred to Stricker in letters to Stricker as his partner, and in some letters to third parties referred to him as his partner, yet taking all the correspondence in its entirety, it is clear that he had no conception of the meaning thereof and that, as a matter of fact and law, they were not partners. Their conduct indicates to the contrary. There were no partnership information returns filed with the Internal Revenue Department; there were no books of partnership set up; there were no written articles of partnership and there is nothing in the record to indicate what any terms of such partnership could have been between them. The books of Stricker, himself, the reports he made to the Internal Revenue Department on his tax returns and his statement as to the interest in oil or mineral lands that he owns are strong circumstances against his present contention. Taking the evidence in its entirety it fails completely to show that he had any interest in any part of the plantation other than in the timber. To hold that there was an agreement between him and Morgan that he should have a one-half interest in the land would be purely a guess or conjecture and certainly when a Court is dealing with real estate or rendering a judgment thereon it is necessary that such judgment be supported by evidence which shows with a reasonable degree of certainty that the party is entitled to such

judgment. In making transfers of real estate the law requires that the understanding be clear and, with very few exceptions, must be in writing. In the present case there was no written document by which the defendant agreed to convey to the plaintiff a one-half interest in the land, nor that the plaintiff has a document showing that the defendant would take title in himself for the benefit of himself and the plaintiff, but the circumstances point strongly to the contrary.

To epitomize and state more concisely my findings of fact and conclusions of law, and without detracting from anything I have hereinbefore said, I now make the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff was familiar with the large timber tracts in and around Wilkinson County, Mississippi along the Mississippi River and had been engaged in the business of buying and selling timber for a great many years. Defendant was engaged in the manufacture of boxes and operated a saw-mill in Kenner, Louisiana. The mill and box factory were operated as a corporation by Defendant, under the name of Louisiana Box and Lumber Company, Inc., defendant obtaining ownership of the stock of this company in the year 1930. In 1939 defendant dissolved the corporation and a partnership was formed for the operation of Louisiana Box and Lumber Company composed of defendant, his son, Eddie C. Morgan and Fred N. Owen.

As early as 1922 the Louisiana Box and Lumber Company was purchasing some of the timber for its

sawmill from plaintiff. These purchases continued until the year 1943, when Louisiana Box and Lumber Company discontinued the operation of its sawmill, relying on suppliers of ready-cut lumber for materials for construction of its boxes. During this period of time plaintiff also sold and handled numerous timber transactions for many individuals and lumber companies.

Commencing in the year 1935, plaintiff and defendant entered into a number of transactions together. There were some ten or eleven transactions between the parties, not including the Esperance Plantation, from which this action arises. The first of these eleven transactions took place in the year 1935 and the last in the year 1942. Plaintiff alleges that as a result of these transactions a partnership agreement arose between him and defendant.

An analysis of these transactions shows that six involved the purchase of timber alone from various tracts in Louisiana and Mississippi. Five of these six timber transactions had a third party involved besides plaintiff and defendant. The radio of participation in the profits from these six timber transactions was different as between the parties involved. In only one of the six transactions involving the purchase of timber were plaintiff and defendant alone concerned and that was the Cole's Creek or Beavin timber in Jefferson County, Mississippi. Plaintiff's record of the Cole's Creek timber purchase transaction shows that he borrowed the sum for the purchase of the timber from the defendant and later sent defendant a check for $500.00 for his participation in this deal.

Four of the five remaining transactions in which plaintiff and defendant participated involved the purchase of timber lands in Wilkinson County, Mississippi. One transaction had no interest vested in plaintiff, but plaintiff had been offered an interest by the defendant, which he refused because of the presence of a third party in the deal whom he disliked. Of the four other transactions involving the purchase of timber lands, third parties participated in three of the transactions. Plaintiff and defendant participated alone in only one transaction in the purchase of timber lands.

There was no partnership or joint bank account set up on any of the transactions. The books and records kept upon the various deals between plaintiff and defendant and others were kept separately and often by different parties. Any report or account transmitted between the parties on any deal was separate and distinct from any other transaction between the parties. Each of the various transactions entered into by plaintiff and defendant stood on its agreement and was not in any way inter-related with any of the other transactions.

There were no partnership informational tax returns filed by plaintiff or defendant for any income received from any partnership operation by these two parties. The fair inference from all the facts, circumstances and conduct of the parties is that there was no general partnership agreement in existence between plaintiff and defendant, nor did any such relationship arise from the dealings between the parties. Plaintiff accepted additional commissions and bonuses in the ne-

gotiation of oil, gas and mineral leases in transactions in which Plaintiff and defendant were involved. These commissions and bonuses were over and beyond the share of defendant in the bonus and delay rentals from these leases. Plaintiff never accounted to defendant for these commissions, nor did he offer to share them with defendant.

The total consideration for the Esperance Plantation was $21,500.00 for the timber and $5,000.00 for the land. In payment, two checks of Louisiana Box and Lumber Company in the total amount of $21,500.00 were issued, signed by its bookkeeper, for the timber. Defendant issued his personal check in the sum of $5,000.00 for payment for the land. Deed to the property from Campbell to defendant was dated December 30, 1940. However, the checks issued in payment for the timber, as well as the check of defendant for the land, were dated January 13, 1941.

The softwood timber on Esperance Plantation was acquired by Louisiana Box and Lumber Company for use in its mill. However, it went out of the sawmill business before it could use the softwood timber and the entire timber on Esperance Plantation was sold to the General Box Company in 1947. The Esperance timber was at all times treated as an asset of Louisiana Box and Lumber Company, carried upon its books and records, and taxes due on the profits made from the sale of the timber reported in its income tax returns for the year 1947.

On the other hand, the Esperance land investment of $5,000.00 was carried in the personal ledger of de-

fendant, separate and apart from the timber. An oil, gas and mineral lease was executed by defendant in December of 1941 and the bonus delay rentals and oil royalties from this lease were recorded in the personal ledger of defendant. Defendant at all times kept his investment in the Esperance Plantation separate and apart from the timber owned by Louisiana Box and Lumber Company.

At the time of the sale of the timber on the Esperance Plantation all items of costs and ad valorem taxes attributable to the timber were applied against the total sales price of the timber. Plaintiff made a detailed analysis of the taxes and expenses as applicable to the timber on Esperance Plantation and refused to bear any part of the expenses or ad valorem taxes as were applicable to the Esperance land. The profits from the sale of the Esperance timber were divided equally between plaintiff and Louisiana Box and Lumber Company.

Plaintiff's claim to an interest in the land is based largely upon the allegation that there was a partnership relationship existing between him and defendant in the operation of the Esperance Plantation. It is basic and fundamental that where the title to real property is in issue or where the validity and effect of contracts concerning the title to such land is in issue, the Court must apply the law of the state of the situs of the real property. See Freedman v. Mass. Mut. Life Insurance Co., 81 F. 2d. 693 (1936) and Pennsylvania Company v. Philadelphia Inquirer Co., 25 F. 2d. 701 (1928). Here the land in question is located in the State of Louisiana and therefore rules of law of that state will here apply.

Plaintiff cannot establish title to real property in Louisiana by parol evidence. The deed to the Esperance property was made solely between Campbell and defendant. Section 2275 of the Louisiana Civil Code provides that every transfer of immovable property must be in writing. Section 2276 of the Louisiana Civil Code further provides that parol evidence is not admissible to prove against or beyond what is contained in the acts of the parties nor on what may have been said before the acts or at the time of the acts or since. The deed to the Esperance Plantation was from Campbell to defendant alone. Plaintiff cannot by the review of disconnected transactions and deals between the parties establish title to the Esperance Plantation. See Harvey v. Richard, et al., 200 La. 97, 7 So. 2d 674 (1942) and Cernich v. Cernich, 210 La. 421, 27 So. 2d 266 (1946); also Prescott, et al., v. Prescott, et al., 170 La. 23, 127 So. 611 (1930).

Under the laws of the State of Louisiana I find there can be no partnership in the Esperance Plantation between plaintiff and defendant in the absence of a proper written agreement. Section 2836 of the Louisiana Civil Code expressly sets out that if any part of the stock of a partnership consist of real estate, the agreement must be in writing. Moreover, the writing must be made and recorded according to the rules prescribed for the conveyance of real estate. Sections 2846, 2847 and 2848 of the Louisiana Civil Code. Plaintiff did not allege the existence of any written articles of partnership between him and defendant nor was any introduced into evidence. Under these facts there could be no partnership agreement between plaintiff and defendant in reference to the Esperance Planta-

tion. Gadlin v. Deggs, 23 So. 2d 704 (1945). Succession of Chapman, 225 La. 641, 73 So. 2d 789 (1954).

Plaintiff further contends that in the event he had no partnership agreement with defendant in the Esperance Plantation that he and defendant were joint adventurers in the transaction. Plaintiff fails to establish the relationship of joint adventurer with defendant for the same reasons that he failed to establish a partnership agreement with defendant. In Louisiana the relation of joint adventurers is governed by the principles which constitute and control the law of partnership. Illinois Central Railroad v. Pope Construction Company, 90 So. 2d 139 (1956). Joint adventurers in land in Louisiana require written articles of agreement properly recorded as in the case of a partnership. Sections 2836, 2846 2847 and 2848 of the Louisiana Civil Code. If the relationship between plaintiff and defendant were that of joint adventurers plaintiff cannot introduce parol evidence to prove an interest to the land in Louisiana. Stack v. Desoto Properties 221 La. 384, 59 So. 2d 428 (1952). Cernich v. Cernich, 210 La. 421, 27 So. 2d 266 (1946). Sections 2275, 2276 and 2440 of the Louisiana Civil Code.

A third contention advanced by plaintiff was that in the event he be not partner or joint adventurer with defendant in the Esperance Plantation, then he was entitled to a one-half interest in the land from a resulting trust. This contention must fail as plaintiff did not contribute any part of the purchase money for the Esperance Plantation. The Bill of Complaint specifically alleges, and the proof shows, that the defendant paid the entire consideration and plaintiff made no contribution thereto. It is a basic and fundamental

rule of law that the claimant of a resulting trust must contribute to the purchase money at the time of the conveyance. Pomeroy Equity Jurisprudence, Bancroft Whitney Company, 5th ed., 1941, Vol. 4, p. 72.

In short I make the following finding of facts and conclusions of law:

1. There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperance Plantation nor did such agreement arise from a course of dealing between the parties. Plaintiff knew and understood that he had no interest in Esperance Plantation beyond a participation in the profits from the sale of the timber

2. In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff.

3. Plaintiff within his books and records or upon his income tax returns never treated any income received from the various deals and transactions between him and defendant as partnership income. Moreover, the method of handling the transactions by the parties negatives the existence of any partnership agreement between plaintiff and defendant. Each transaction stood on its own facts and was separate and distinct from any other transaction.

4. Plaintiff knew and understood from the date of the purchase of the Esperance Plantation that he had

no interest in the land beyond a share in the profits from the sale of the timber.

5. Plainitff claimed no ownership of the Esperance land in a letter in 1948 to the Internal Revenue Service, nor in the oil, gas and mineral lease existing on the land.

6. Defendant has had the record title and has been in full, open possession of the Esperance Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperance land from that date.

The plaintiff having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff.

This the 20th day of January, 1958.

S. C. Mize
UNITED STATES DISTRICT JUDGE

APPENDIX II

ORDER DISMISSING COMPLAINT

(Title omitted—filed February 4, 1958)

This cause came on to be heard on the complaint and answer thereto, oral and documentary evidence, and the Court having heard same and the argument of counsel, is of the opinion that the Plaintiff is not entitled to recover anything by his suit and that the complaint should be dismissed.

It is therefore ordered by the Court that the Plaintiff takes nothing by his suit and that the complaint be and it is hereby dismissed finally on its merits and that Plaintiff be taxed with all costs for which execution may issue.

Ordered this 1st day of Feby. 1958.

APPENDIX III

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Title omitted—filed April 23, 1958)

The Plaintiff having filed a motion for amendment of findings of fact and conclusions of law and for an amendment of the judgment heretofore entered in the above styled cause, and the Court having heard same and the argument of counsel, and having fully considered the matter, now makes additional findings of fact and conclusions of law:

The Court finds as a fact that the Defendant, in open Court, admitted that the Plaintiff acquired a one half interest in the timber that was acquired from A. H. Campbell by J. P. Morgan on December 30, 1940; that, as a matter of fact, the Plaintiff, R. M. Stricker, acquired a *one*-half interest in all of the timber that was then growing, standing and being on the Esperanza Plantation.

I find as a fact from the admission and all of the other evidence introduced that it was the intent of Morgan and Stricker that the Plaintiff, Stircker, acquire only a one-half interest in the timber that was then standing, lying or being upon said lands, and that he acquired no interest in timber to be grown in perpetuity; that the Plaintiff is entitled to an accounting from J. P. Morgan for the value of any and all timber, if any, that has been sold by the Defendant, Morgan, and for which he has not heretofore accounted; that the Plaintiff, R. M. Stricker, is now the owner of one-half of any timber that may now

be on said lands and which timber was growing upon said land on December 30, 1940, together with all the timber rights that lawfully flow with the ownership of such timber.

CONCLUSIONS OF LAW

I conclude as a matter of law that by the acquisition of a one-half interest in the timber on December 30, 1940 the Plaintiff did not acquire any interest in any timber that was not then on December 30, 1940, growing on said land.

I conclude as a matter of law that it was the intent of the parites Plaintiff and Defendant on December 30, 1940 that the Plaintiff would acquire a one-half interest only in the timber that was then growing on said land and it was not the intention of the parties that the Plaintiff might own a one-half interest in all the timber to be grown upon said lands in perpetuity.

These findings of fact and conclusions of law do not supersede or change any of the findings of fact and conclusions of law heretofore made, but are made in addition thereto.

This the 22nd day of April, 1958.

s S. C. Mize
UNITED STATES DISTRICT JUDGE

APPENDIX IV

JUDGMENT

(Title omitted—Filed April 23, 1958)

This cause came on to be heard on the motion of Plaintiff for an amendment of the findings of fact and conclusions of law heretofore made and for an amendment of the judgment heretofore entered in this cause and the Court having heard same and considered the record and the argument of counsel, is of the opinion that said motion should be sustained only to the extent that the Plaintiff, R. M. Stricker, acquire a one-half interest in all timber that was growing upon Esperanza Plantation on December 20, 1940 and in all other respects the motion should be overruled.

It is therefore ordered by the Court that the judgment heretofore entered in this cause be and the same is hereby amended to the extent above stated and it is now ordered and adjudicated by the Court that on December 30, 1940 the Plaintiff, R. M. Stricker, acquired a one-half interest in all the timber then growing on Esperanza Plantation in Concordia Parish Louisiana and on December 30, 1940 became the owner of a one-half interest in the timber then growing on said lands, together with all the timber rights lawfully flowing with such acquisition, and is now the owner of a one-half interest in any remaining timber now on said lands which was growing thereon on December 30, 1940.

It is ordered by the Court that the judgment heretofore entered on the 1st of February, 1958 be and the

same hereby is modified and amended to the extent above stated.

It is further ordered that Mrs. Margaret Koehler Morgan, Curatrix of the estate of Joseph P. Morgan, interdict, shall execute to R. M. Stricker a deed conveying the timber hereinabove adjudicated unto R. M. Stricker. If she fails so to do, then this judgment will act as a conveyance of said timber unto the said R. M. Stricker.

It is further ordered that the said J. P. Morgan, through his curatrix, shall account to R. M. Stricker for one-half the value of any timber that was growing upon said land on December 30, 1940 which may have been sold by the said J. P. Morgan and for which he has not heretofore accounted.

It is further ordered by the Court that in all other respects the motion of the Plaintiff be and the same hereby is overruled and that the judgment entered on February 1, 1958 shall remain in full force and effect except as above mentioned and amended.

It is further ordered that the Plaintiff, R. M. Stricker, be *and* he is hereby taxed with all costs that may have accrued.

ORDERED, this the 22nd day of April, 1958.

s/ S. C. Mize
UNITED STATES DISTRICT JUDGE

Entered COB 2 Page 293

APPENDIX V.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 17570

R. M. STRICKER,

Appellant,

versus

J. P. MORGAN, ET AL., (MRS. MARGARET KOEHLER MORGAN, EDWARD C. MORGAN and EVELYN MORGAN WIEMER, substituted as appellees in the place and stead of J. P. MORGAN, deceased),

Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(August 6, 1959.)

Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

CAMERON, Circuit Judge:- This appeal presents the question whether the court below, sitting without jury, was clearly erroneous in holding that plaintiff-appellant R. M. Stricker had not sustained the burden of proving that he was entitled to a decree against defendant-appellee J. P. Morgan,[1] confirming in plaintiff title

[1] Morgan was during the course of the trial, declared non compos mentis and his wife Margaret, Curatrix of his person and estate, was substituted as defendant in his place and stead. Subsequent to the entry of the judgment below

to an undivided one-half interest in Esperanza Plantation in Concordia Parish, Louisiana, and ordering an accounting for oil rentals and royalties and other income derived from said plantation. Plaintiff charged that he was entitled to said relief under the claim that there was a profit and loss sharing agreement between him and defendant making them partners or joint venturers with respect to said plantation, or creating as to it a constructive or resulting trust in said land as between him and defendant. This relationship, by whatever name called, was, under the plaintiff's claim, created by a course of dealings beginning in 1935 and continuing through the time when title to said plantation was vested by deed in the defendant.[2] Defendant denied the

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and to this appeal, he died and his heirs were substituted as appellees.

The suit originally included as defendants Magnolia Petroleum Company, Interstate Pipe Line Company and Esso Standard Oil Company. An order of dismissal has been entered as to Interstate. Magnolia and Esso are merely garnishee defendants under the Mississippi Chancery Attachment Statutes—this suit having originated in the Chancery Court of Wilkinson County, Mississippi.

The word defendant whenever herein used, unless the contrary is indicated, refers to said Morgan or said Curatrix, the main defendant, according to the facts existing at the time.

Plaintiff's argument is thus epitomized in his brief:

"On or about November 16, 1935, Stricker and Morgan entered into a profit and loss sharing contract and agreement which created a status between them that has been denominated by them as a partnership. . . . No formal written articles of agreement were executed by the parties. The agreement is evidenced by many instruments, memoranda, communications, accounts and other items in writing, by the acts and conduct of the parties between themselves and with others and their various transactions shown in this record, as will be hereinafter cited. The record discloses that this contract and agreement had its inception on or about November 16, 1935, and that the agreement as finally made between the parties Stricker and Morgan was to the effect that Stricker, who had an expert knowledge of timber, timber lands and plantations, would locate, as

existence of such a general agreement, claiming that each of the several deals between them rested entirely "on its own bottom."

Plaintiff asserts that the contract between him and defendant was a Mississippi contract controlled by its laws, but argues that he is entitled to the same relief even if the laws of Louisiana are applied. Defendant stands on the argument that plaintiff is not

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recommendations of Stricker, Morgan would advance and pay opportunity should be presented, various tracts of land and timber that in his opinion could be purchased, managed and handled on a profitable basis; that he would have the timber on said lands cruised and, as and if he should consider the same a profitable purchase, he would present the matter of the purchase to the consideration of Morgan; that upon approval of such purchase by Morgan on the all of the purchase price, costs and expenses of acquisition and operation of the properties, including taxes, attorneys' fees and other expenses, and title to all of such properties purchased should be taken in the name of Morgan; that thereafter Stricker would look after, manage and control the property, make all contracts for cutting and removing timber therefrom, tend to logging and rafting the timber for delivery to Morgan at Louisiana Box & Lumber Company, Kenner, Louisiana, of such of the logs as Morgan for his mill would require and making contracts for the sale of other logs and timber to others, selling the lands, leasing the same, negotiating oil, gas and mineral leases thereon, managing and conducting all operations on the said lands and otherwise generally managing the same; and that when from the proceeds of timber and other business operations thereon sales of parts of land, leases on same, etc., Morgan should be repaid the amount of his cash outlays and interest at Six Per Cent (6%) per annum thereon, all profits should be divided, share and share alike, between Stricker and Morgan, and ultimately Morgan would convey to Stricker an undivided one-half (1/2) interest in the land or timber or land and timber as the case might be. Stricker and Morgan agreed to share profits and losses, share and share alike. It was further understood and agreed as a part of the contract that in such instances as it might be or become desirable to include some other person or persons in the purchase and acquisition of any lands or timber or lands and timber, that such should be done by mutual consent and such other person or persons be accorded a like interest and share or such interest and share as might be agreed upon."

entitled to any relief, because his relationship with plaintiff was governed by Louisiana law, which barred plaintiff's recovery because the contract was not in writing. Another sharply contested point of law related to whether the court below correctly declined to permit plaintiff to testify under the Mississippi "Dead Man's Statute."[3]

In an exhaustive, well written and documented opinion the district judge decided all of the issues in favor of defendant and against plaintiff, and reference is made to his opinion in the case of *Stricker v. Morgan*, 158 F. Supp. 830.[4] The facts are fully and fairly stated in said opinion and no good purpose would be served by repeating them here. A reading of the briefs and this voluminous record fails to convince us that the court below was clearly erroneous in its findings of

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[3] Mississippi Code of 1942, §1690.

[4] The opinion, including the findings, was filed Jan. 23, 1958, and the final judgment filed Feb. 4, 1958, dismissed the complaint *in toto*. Plaintiff moved that both be amended and, by amended findings and judgment filed April 23, 1958, the court modified the judgment first entered by requiring defendant to execute a deed conveying to plaintiff an undivided one-half interest in all of the timber growing on Esperanza Plantation on Dec. 30, 1940, and to account to plaintiff for one-half of money derived from the sale of said timber. Defendant did not contest this modification.

June 17, 1958, defendant filed notice of compliance with said amended judgment, attaching copy of deed dated May 26, 1958 conveying to plaintiff said one-half interest in said timber. June 26, 1958, plaintiff filed a response asserting that plaintiff would not accept but was returning said deed because he declined to accept performance of part only of the relief to which he was entitled. The record shows that the Esperanza timber was sold to General Box Company in 1947 for $87,000.00 and that distribution of this sum was made between plaintiff and defendant. Notice of appeal by plaintiff had been filed April 28, 1958.

fact, which are thus summarized on the last page of the opinion (P. 842):

> "There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperance Plantation nor did such agreement arise from a course of dealings between the parties. Plaintiff knew and understood that he had no interest in Esperance Plantation beyond a participation in the profits from the sale of the timber.
>
> "In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff. . . .
>
> "Plaintiff knew and understood from the date of the purchase of the Esperance Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber. . . .
>
> "Defendant has had the record title and has been in full, open possession of the Esperance Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperance land from that date.
>
> "The plaintiff having failed to meet the burden or proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

These facts as found by the court would require a judgment for the defendant whether the rights of the

parties were governed by Mississippi law or by Louisiana law. Even if we accept that the general course of dealings between the parties gave rise to a series of "deals" amounting to partnerships, joint ventures or trusts, resulting or constructive, justifying the application of the liberal rules plaintiff conceives to be followed by the Mississippi courts," plaintiff would still proceed throughout under the burden of establishing the terms of the particular contract between him and the defendant with respect to the Esperanza Plantation. Plaintiff concedes, as he must and as is illustrated by the quotation from his brief, footnote 2 *supra*, that every transaction between him and defendant was different from every other transaction. That is exactly what the court below declared: "The fair inference from all of this testimony is that each transaction was separate and distinct within itself, and was based upon an understanding between Stricker and Morgan, and if third parties were included, on the understanding with them, and contracted only as to that particular transaction."

Plaintiff discusses eleven transactions between the two in addition to the Esperanza deal and, in some of them, plaintiff was interested in the timber alone, and in the land, and in others neither of them acquired any interest in the land. The ultimate question for decision by the court below, therefore, was whether in the Esperanza transaction plaintiff acquired an interest in

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Such as the principles established in Sample v. [illegible] Pomroy, 1913, 8 So.2d 257; McCartney v. McKendrick, 1956, 87 So.2d 161; and of Parker v. Nason, 5 Cir., 1956, 236 F.2d [illegible]

the land or an interest in the timber only. The trial court had before it testimony of witnesses who were present when the Esperanza agreement was discussed and was closed and, in addition, it heard much evidence, record and otherwise, of circumstances throwing light upon the parties' dealings; and it heard and considered a number of admissions against interest by both parties along with statements and actions constituting construction by the parties of the arrangement between them. From all of this evidence the court reached the definite conclusion that the Esperanza deal was separate from all the others, that the timber was purchased with funds of Louisiana Box and Lumber Company, and was held by defendant for the joint benefit of plaintiff and said company; that the land was purchased by defendant, and that plaintiff acquired no interest therein, and that the oil, gas and mineral rights being a part of the estate in the land itself, were the property of the defendant free from any claim of the plaintiff.

The conclusions reached by the court below were required by law if the facts found by it were supported by the evidence, so that the fundamental question before us remains throughout whether its findings of fact were clearly erroneous. As heretofore stated we think that its findings were supported by credible evidence. The factual situation with which it dealt was quite involved and the court set forth its findings clearly and in detail in its published opinion. Being

Until 1929 [illegible] owned by defendant Wood [illegible] shown, named Owen

convinced from a careful examination of the record and the exhibits that the findings were justified, we decline to set them aside under the clearly erroneous rule."

Plaintiff urges that it was error for the court below to deny him the right to testify upon objection by defendant that his testimony was inadmissible under §1690 of the Mississippi Code of 1942, commonly known as the "Dead Man's Statute;"[9] and that his testimony would have influenced the court to find the facts in his favor. When plaintiff was offered as a witness defendant objected, invoking the protection of the statute; and extensive proceedings were had before the court below made its ruling. These included a comprehensive stipulation dictated by the attorneys into the record, by which plaintiff attempted to establish that defendant had waived the right to rely upon the Mississippi Statute by taking plaintiff's deposition and utilizing the information developed therefrom in preparation for the trial and in developing his proof.[10] Plaintiff also dic-

Rule 52 (a), F.R.C.P.

"§1690. Claimant against estate of decedent or person non compos mentis.

"A person shall not testify as a witness to establish his own claim or defense against the estate of a deceased person, which originated during the lifetime of such deceased person, or claim he has transferred since the death of such decedent. Nor shall a person testify as a witness to establish his own or assigned claim or defense against the estate of a person of unsound mind, which originated before the ward became a non compos mentis.

The facts constituting the basis for the claimed waiver are thus criticized in plaintiff's brief:

"Defendant procured the taking of Stricker's deposition on March 23, 1956. This suit was filed October 15, 1955. Counsel for Defendant made no effort to take the deposition of or perpetuate the testimony of Morgan. Although Plaintiff had sought to take the deposition of Morgan at the same time Defendant took the deposition of Stricker, the

tated into the record a showing of what Stricker would testify if placed on the stand,[11] and also introduced in evidence the discovery deposition which had been

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Plaintiff deferred to the request of Defendant to delay the taking of the deposition because of Morgan's illness. Morgan having recuperated, it was agreed that his deposition be taken on August 23, 1956.

"On August 11, 1956, counsel for Defendant served notice that Morgan had become non compos mentis and hence that his deposition could not be taken.

"Thereafter on September 19, 1956, counsel for Defendant Morgan filed in this cause the said deposition of Plaintiff Stricker which they had taken on March 23, 1956 . . .

"Morgan was not interdicted until thereafter, i.e., on November 20, 1956, and record of interdiction was not filed herein until January 15, 1957.

"Defendant Morgan utilized the deposition of Plaintiff Stricker in preparation of his defense of this suit, in procuring records and files of the Plaintiff which were offered thereafter in evidence by the Defendant, and by motion . . . required and procured of Plaintiff the production and filing in court . . . of further records from the files of the Plaintiff, *and including* the

"1. Black memorandum notebook used by the Plaintiff to refresh and recollect his memory during the taking of Plaintiff's deposition on the 23rd of March, 1956 . . .

"Prior to the time when counsel for Plaintiff offered the Plaintiff Stricker as a witness in his own behalf, the Defendant, in the course of this trial, had offered in evidence, and had adduced testimony pertaining to, certain documents and letters procured by Defendant from the records and files of the Plaintiff, including letters written by the Plaintiff, . . . and cross-examined Mr. John Dale, Jr., one of counsel for Plaintiff with regard to the deposition of Stricker."

In effect it was represented that plaintiff would testify to facts that would establish the allegations of his complaint, to a course of dealings between himself and defendant over many years extending prior to 1935 down to this time, and to the fact that they did form and enter into partnership transactions and became co-partners on an arrangement whereby Stricker, being a practical timber man and familiar with timber locations, etc., would ascertain that lands and timber were available to purchase, and that defendant Morgan would produce the capital, and that as soon as Morgan was repaid his capital investment, the properties would be shared; and that the partnership extended over the years and to the time of trial.

taken and filed by defendant, but not offered in evidence by him.

The court below, as stated, sustained the objection to the competency of Stricker as a witness, basing its ruling chiefly (158 F. Supp. 837) upon the Mississippi case of *Veazey v. Turnipseed*, 219 Miss. 559, 69 So.2d 379. A reading of that case will demonstrate the correctness of the trial judge's estimate of it.[12]

Plaintiff relies upon four Mississippi cases,[13] but we do not find any of the cases at war with the holdings

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12 These disconnected excerpts from the decision will serve to show its applicability here. 69 So.2d 383-384:

". . . Nor was there any waiver by appellees of appellant's incompetency merely because Mrs. Perkins was permitted to testify concerning admissions against interest by Veazey. When a litigant introduces statements by an adversary against his own interest, this does not constitute a waiver of Section 1690 so as to make the adversary a competent witness. A good illustration of this arose in Martin v. Martin's Estate, Miss., 1953, 63 So.2d 827, where appellant claimed to be the common-law wife of Peter Martin, deceased, and therefore sought to renounce his will. Appellee introduced income tax reports of appellant in which she stated that she had no husband. Many witnesses testified that appellant always referred to herself as Mrs. Moore, and not Mrs. Martin, and that she introduced herself, as Mrs. Moore the housekeeper and not Mrs. Martin. The court expressly rejected the argument that such evidence for appellee waived appellant's incompetency under Section 1690 to testify for her claim against the estate.

"Appellant further contends that Veazey was competent to testify as to what he did with the [will] after Mrs. Perkins delivered it to him. However, such testimony would be directly in the face of the prohibition of Section 1690, and would support Veazey's claim against the estate of Mrs. Smith. . . . Appellant admits that Veazey received the instrument from Mrs. Perkins. We hold that the learned trial court was correct in ruling that he was incompetent to testify either that he gave the will to Mrs. Smith or that if Mrs. Perkins gave him the will, whatever she gave him he gave it to Mrs. Smith. . . ."

13 Waldauer v. Parks, et al, 141 Miss. 617, 106 So. 881; Burchett, et al v. Undermark, 145 Miss. 683, 110 So. 237; Fant, et al v. Fant, et al, 163 Miss. 472, 162 So. 159; and Stuckey v. Sallis, 211 Miss. 698, 74 So.2d 749.

of *Veazey, supra,* and they do not, in our opinion support plaintiff's position. Plaintiff also cites three cases by federal courts, chief reliance being placed upon *Mutual Life Insurance Co. v. Green,* (D.C. Ky., 1941), 37 F. Supp. 949. A reading of that case shows that the United States District Judge ruled that the incompetency of a witness was waived by the taking prior to the trial, and filing during the course of the trial, of the deposition of the person claimed to be an incompetent witness. The court discussed a large number of decisions of the state courts of Kentucky, and concluded that they were in conflict. The ruling was based entirely upon state court decisions concerning the Kentucky Statute. That was, of course, in obedience to Rule 43(a) F.R.C.P.[14] The court below properly held itself bound by the statute of Mississippi as construed by the Mississippi courts. It is clear under the Federal Rules[15] that the taking of the deposition under the circumstances disclosed by the evidence did not constitute a waiver of the protection of the Mississippi statute.[16]

This case was presented to the court below—as well as to us—with unusual skill and diligence by the attorneys on both sides. The trial lasted many weeks and

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[14] ". . . All evidence shall be admitted which is admissible . . . under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. . . . . The competency of a witness to testify shall be determined in like manner."

[15] E.g., Rule 26(f).

[16] Cf. 4 Moore's Federal Practice, 2d Edition, Par. 26.02, and Anderson v. Benson, 1953, D.C. Neb., 117 F. Supp. 765, and Duling v. Markun, 7 Cir., 1956, 231 F.2d 833, same case, 1958, 251 F.2d 361.

recesses were taken so that the parties would have the best possible opportunity to make the fullest presentation of their evidence. The record presents a typical case for the application of the rule which invests the findings of fact by the trial court with the weight which attends the regard appellate courts accord to its opportunity to judge of the credibility of the witnesses.

Being unable to say that the findings of the court below, so well and fully stated by it, are clearly erroneous, its judgment is

AFFIRMED

APPENDIX VI.

ORDER DENYING REHEARING.

Extract from the Minutes of September 30, 1959.

No. 17570

R. M. STRICKER,

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as appellees in the place and stead of J. P. Morgan, deceased).

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Louisiana Civil Code, Article 21:

> "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Louisiana Civil Code, Article 2292:

> "Certain obligations are contracted without any agreement, either on the part of the person bound or, of him in whose favor the obligation takes place.

"Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.

"The first are such engagements as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases of a like nature.

"The obligations, which arise from a fact, personal to him who is bound, or relative to him, result either from quasi contracts, or from offenses and quasi-offenses."

Louisiana Civil Code, Article 2293:

"Quasi contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties."

Louisiana Civil Code, Article 2294:

"All acts, from which there results an obligation without any agreement, in the manner expressed in the preceding article, form quasi contracts. But there are two principal kinds which give rise to them, to wit: The transaction of another's business, and the payment of a thing not due."

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Office
JAMES

APPENDIX VII.

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased),

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DALE, RICHARDSON & DALE,
Attorneys at Law,
410 Reymond Building,
Baton Rouge, Louisiana,
BRANDON, BRANDON, HORNSBY & HANDY,
Attorneys at Law,
Natchez, Mississippi,
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EDWIN LELAND RICHARDSON,
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DALE, RICHARDSON & DALE,
Attorneys at Law,
Vidalia, Louisiana,
G. N. SIMS,
Attorney at Law,
Vidalia, Louisiana,
CLAY B. TUCKER,
Attorney at Law,
Woodville, Mississippi

EXHIBIT "S-1"

No. 15060

A. H. CAMPBELL, : DEED, Filed at 11:00 A. M. March 29th, 1941.

-TO-

J. P. MORGAN, : STATE OF TENNESSEE
COUNTY OF SHELBY

BE IT KNOWN, That this day before me, the undersigned Notary Public, in and for the said County, duly commissioned and sworn, came and appeared A. H. Campbell, a widower whose address is Sterrick Building, Memphis, Tennessee, who declared that he does by these presents grant, bargain, sell, convey and deliver with full guarantee of title and with complete transfer and subrogation of all rights and actions of warranty against all former proprietors of the property here: conveyed unto J. P. Morgan a married man whose wife's name is _____ the following described property, to-wit:

The Esperanze Plantation, comprising all of Sections five (5), Six (6), Seven (7), eight (8), Nine (9), thirty eight (38), thirty nine (39) and forty (40) in Township five (5) Range Nine (9), and all in Township Five (5) Range Ten (10); and also tract containing 20 acres, situated in Sections fifty three (53) and fifty four (54) of Township five (5) range Nine (9) bounded as follows:

beginning at the northeast corner of section 9, township 5 range

A. H. CAMPBELL, : DEED, Filed at 11:00 A. M. March 29th, 1941.

-TO-

J. P. MORGAN, : STATE OF TENNESSEE
COUNTY OF SHELBY

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The Esperanze Plantation, comprising all of Sections five (5), Six (6), Seven (7), eight (8), Nine (9), thirty eight (38), thirty nine (39) and forty (40) in Township five (5) Range Nine (9), and all in Township Five (5) Range Ten (10); and also tract containing 40 acres, situated in Sections fifty three (53) and fifty four (54) of Township five (5) range Nine (9) bounded as follows:

beginning at the northeast corner of section 9, township 5 range 9, and running thence north 21-1/2 degrees west 20 chains, along an old levee; thence scuth 59 degrees west 23.50 chains; thence

Plaintiff's Exhibit No. 20.

thence south 49 degrees west 21 chains; thence north 71 chains east along the north line of section 10, township five range nine, to the northwest corner of said section nine, township 5 range 9; thence north 89-1/2 degrees east along the north line of said section nine, 23.52 chains to the point of beginning; said 40 acres being the same tract sold by S. B. Yeager to J. W.Walker by act dated January 6, 1906, recorded in Deed Book X, page 240 of the records of Concordia Parish, Louisiana.

Said Esperanze Plantation here conveyed includes all of the accretion and batture formed adjacent to said above named sections, except that there is excepted and reserved and not hereby conveyed, the batture and land conveyed by J. W. Walker to W. B. Roberts and J. L. Wilson by deed dated March 23, 1909 and recorded in Deed Book "Y" page 35 of the records of said Concordia Parish, La., to which act reference is here made for a detailed description of said tract; and also excepting the Island conveyed by J. W. Walker to Roberts and Wilson by deed dated November 19th, 1909 and recorded in deed book "Y" page 142 of said records.

And also excepting the batture lands conveyed by N Junkin and Gregory to Hogue et als., as per deed recorded in Deed Book "CC" page 410 of the records of Concordia Parish, La., to which reference is here made for more particular description. There is excepted and not included in this abstract Section 12, T 5 N R 10 E., heretofore reserved by the United States

nine, to the northwest corner of said section nine, township 5 range 9; thence north 89-1/2 degrees east along the north line of said section nine, 23.52 chains to the point of beginning; said 40 acres being the same tract sold by S. B. Yeager to J. W.Walker by act dated January 6, 1906, recorded in Deed Book X, page 240 of the records of Concordia Parish, Louisiana.

Said Esperanze Plantation here conveyed includes all of the accretion and batture formed adjacent to said above named sections, except that there is excepted and reserved and not hereby conveyed, the batture and land conveyed by J. W. Walker to W. B. Roberts and J. L. Wilson by deed dated March 23, 1909 and recorded in Deed Book "Y" page 35 of the records of said Concordia Parish, La., to which act reference is here made for a detailed description of said tract; and also excepting the Island conveyed by J. W. Walker to Roberts and Wilson by deed dated November 19th, 1909 and recorded in deed book "Y" page 142 of said records.

And also excepting the batture lands conveyed by N Junkin and Gregory to Hogue et als., as per deed recorded in Deed Book "CC" page 410 of the records of Concordia Parish, La., to which reference is here made for more particular description. There is excepted and not included in this abstract Section 12, T 5 N R 10 E., heretofore reserved by the United States for

for schools.

Said Esperanze Plantation includes all of what is known as the Esperanze and Pecan Plantations, and the Guice, Canaan and Yeager tracts, all of said plantations and tracts being now included under the name of "Esperanze Plantation": said Esperanze Plantation, here conveyed being bounded north by Hnderson-Ashley Plantation and the Mississippi River; east by the Mississippi River; South by said tract sold to O. Roberts & Wilson, and west by lands now owned by Mrs. Barker and the Mississippi River; and being the same property acquired by said vendor from Hiram F. Gregory by act of sale dated June 10th, 1935 and recorded in Deed Book "EE" page 231 of the records of said Concordia Parish, La., it being the intention of this act to convey, and there being hereby conveyed, all of the property acquirec by said vendor in said act, whether particularly described hereon or not.

There is reserved from this sale all oil, gas, and mineral rights of whatsoever nature lying in, on or under the South half of the property above described together with all rights of ingress and egress necessary or incidental thereto.

TO HAVE AND TO HOLD said described property unto said purchaser, his heirs and assigns forever. This sale is made for the consideration of the sum of Twenty Five Hundred ($2500.00) Dollars, cash in hand paid the receipt of which is hereby acknowledged, and other- good and valuable consideration well

Said Esperanze Plantation includes all of what is known as the Esperanze and Pecan Plantations, and the Guice, Canaan and Yeager tracts, all of said plantations and tracts being now included under the name of "Esperanze Plantation": said Esperanze Plantation, here conveyed being bounded north by Hnderson-Ashley Plantation and the Mississippi River; east by the Mississippi River; South by said tract sold to C. Roberts & Wilson, and west by lands now owned by Mrs. Barker and the Mississippi River; and being the same property acquired by said vendor from Hiram F. Gregory by act of sale dated June 10th, 1935 and recorded in Deed Book "EE" page 231 of the records of said Concordia Parish, La., it being the intention of this act to convey, and there being hereby conveyed, all of the property acquirec by said vendor in said act, whether particularly described hereon or not.

There is reserved from this sale all oil, gas and mineral rights of whatsoever nature lying in, on or under the South half of the property above described together with all rights of ingress and egress necessary or incidental thereto.

TO HAVE AND TO HOLD said described property unto said purchaser, his heirs and assigns forever. This sale is made for the consideration of the sum of Twenty Five Hundred ($2500.00) Dollars, cash in hand paid the receipt of which is hereby acknowledged, and other- good and valuable consideration well

well known to both parties and acknowledged by both parties to be serious, adequate and commensurate with the value of the properties herein sold.

The certificate of mortgage is hereby waived by the parties and evidence of the payment of taxes has been produced.

Thus done and passed at my office in said - State of Tennessee, County of Shelby, in the presence of the two undersigned competent witnesses and me the undersigned Notary on this the 30th day of December, 1940.

A. H. CAMPBELL

K. T. Crawford

Paul G. Robertson

(seal) Ruth Curron

Notary Public

My Commission expires April 8th, 1941.

A true copy of the original recorded March 29th, 1941.

/s/ V. P. Campbell
Clerk of Court

A true copy attest:

/s/ Jean Brewer

Deputy (seal)

A TRUE COPY. I HEREBY [illegible]

well known to both parties and acknowledged by both parties to be serious, adequate and commensurate with the value of the properties herein sold.

The certificate of mortgage is hereby waived by the parties and evidence of the payment of taxes has been produced.

Thus done and passed at my office in said - State of Tennessee, County of Shelby, in the presence of the two undersigned competent witnesses and me the undersigned Notary on this the 30th day of December, 1940.

A. H. CAMPBELL

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(seal) Ruth Curron

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/s/ V. P. Campbell
Clerk of Court

A true copy attest:

/s/ Jean Brewer

Deputy (seal)

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY: Ruby L Short
Deputy Clerk

A. H. CAMPBELL
Sterick Building
Memphis, Tenn

December 31st, 1940

Mr. John Dale, Jr.,
Vidalia, La.

Dear Mr. Dale:-

I have a letter today from Mr. Barchus and I gather from it, he has all of his parties in accord with the land trade. He wants me to execute two deeds, one for timber to Mr. Jones and the other for land to Mr. Laub.

I would prefer to just make one deed to Mr. Laub and then let him make the timber deed to Mr. Jones. You can word my deed to Mr. Laub so that I will have no claim on the timber in the vendor's lien that I retain for the $2,500.00 due on or before December 31st, 1941 with interest from date until paid at 4% per annum.

I am writing Mr. Barchus about this today.

Yours very truly,
A. H. CAMPBELL

TRUE COPY, I HEREBY CERTIFY.
LONYCE E. WHARTON, CLERK
BY: Ruby L. Short
Deputy Clerk

Exhibit P-39

December 31st, 1940

Mr. John Dale, Jr.,
Vidalia, La.

Dear Mr. Dale:-

I have a letter today from Mr. Barchus and I gather from it, he has all of his parties in accord with the land trade. He wants me to execute two deeds, one for timber to Mr. Jones and the other for land to Mr. Laub.

I would prefer to just make one deed to Mr. Laub and then let him make the timber deed to Mr. Jones. You can word my deed to Mr. Laub so that I will have no claim on the timber in the vendor's lien that I retain for the $2,500.00 due on or before December 31st, 1941 with interest from date until paid at 4% per annum.

I am writing Mr. Barchus about this today.

Yours very truly,
A. H. CAMPBELL

TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY: Phillip L. Short
Deputy Clerk

Exhibit P-39

Plaintiff's Exhibit No. 39

52

LOUISIANA BOX & LUMBER CO.
Boxes, Box Shooks, Vegetables & Fruit Crates
Lumber & Veneer
Egg Cases
Oars, Paddles & Handles

January 22, 1941

Mr. John Dale, Jr.
Vidalia, Louisiana

Dear Sir:-

Yours received, telling us the banks charged $26.50 for collecting the checks, which is entirely out of line. The Woodville checks are also entirely out of line. You should have let me know before you accepted the balance, as I could have gotten this $26.50 check through for about 65¢ or 70¢. In all of my business dealing I have never seen such charges. If you can possible have same recalled I will wire you the money by Western Union, or any other way for a whole lot less.

Have just talked with our banker, who said it was the most rediculous thing he has ever heard of. A check of that size should get plenty of reduction, and they have charged over $1.25 per thousand. You should have let me know before accepting a cash settlement where it costs so much money.

I will take the above up with Mr. Stricker when I see him.

Just phoned the bank and they say the check is in, if it would not have been I would have had payment stopped on same and handled in a different way. I will know better next time.

Yours very truly,

J. P. Morgan

JPM/G

J. P. Morgan

CC: Mr. R. M. Stricker
Woodville, Miss.

E COPY, I HEREBY CERTIFY.
ICE E. WHARTON, CLERK

Lucy L Shoh
Deputy Clerk

Plaintiffs Ex. 214

Dear Sir:-

Yours received, telling us the **banks** charged $26.50 for collecting the checks, which is entirely out of line. The Woodville checks are also entirely out of line. You should have let me know before you accepted the balance, as I could have gotten this $26.50 check through for about 65¢ or 70¢. In all of my business dealing I have never seen such charges. If you can possible have same recalled I will wire you the money by Western Union, or any other way for a whole lot less.

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I will take the above up with Mr. Stricker when I see him.

Just phoned the bank and they say the check is in; if it would not have been I would have had payment stopped on same and handled in a different way. I will know better next time.

Yours very truly,

JPM/G

J. P. Morgan

J. P. Morgan

CC: Mr. R. M. Stricker
Woodville, Miss.

E COPY, I HEREBY CERTIFY.
ICE E. WHARTON, CLERK

Ruby L. Shoh
Deputy Clerk

Plaintiffs Ex. 214

Plaintiff's Exhibit No. 214.

February 8, 1941

Mr. J. P. Morgan
Kenner, Louisiana

Dear Mr. Morgan:-

I was rather surprised to receive your letter concering the bank charges on the checks on the Stricker deal. The suggestion to handle the matter in the way it was handled came from your onw attorney, Mr. Jones, and I was merely trying to accomodate all parties concerned in the handling of the transaction and it seems by doing so am being critized.

It seems to me that no one concerned should expect me to pay these charges and that this matter should be determined among yourselves as to who should be responsible for these deductions.

Yours very truly,

John Dale, Jr.

JD2/eh
cc Mr. R. N. Stricker
Woodville, Miss.

Mr. A. H. Jones
Woodville, Miss.

Mr. Chas. Barchus
Natchez, Miss.

E COPY, I HEREBY CERTIFY.
CE E. WHARTON, CLERK

Ruby L. Shark
Deputy Clerk

LOUISIANA BOX AND LUMBER CO.
Boxes, Box Shooks, Vegetables & Fruit Crates
Lumber & Veneer
Egg Cases
Cars, Paddles & Handles

Kenner, La.

February 12, 1941

Mr. John Dale, Jr.
Vidalia, Louisiana.

Dear Mr. Dale:-

Yours of the 8th received.

I am sorry if I have said anything in my letter that you have taken as criticism. That is something I never do to anyone because we all, more or less, want to be friends, and, personally, I certainly want to be your friend and want you to be mine. I only tried to state what my banker told me over the phone, he said it was outrageous. Whether he knows what he is talking about or not I don't know.

I am sending a copy of this letter to Mr. R. M. Stricker and suggesting that we all get together and pay those charges. I cannot see why it should be all one man's fault, regardless of whose it is. We paid the price asked for the land and if I would have thought it would have been like those charges I certainly would have made things different, but I don't blame you and I know you will not have to stand it, because, I figure you a disinterested party as far as money transactions are concerned.

I would suggest your sending the man who sold the land 1/3, Mr. J. M. Jones 1/3, and 1/3 to myself, and see what effect it has, but please do not think I wrote the letter in any unpleasant mood. Furthermore, I am not going to do anything that I would think would cause you to think less of me knowingly.

Yours very truly,

J. P. MORGAN

J. P. MORGAN

JPM/G
CC: Mr. R. M. Stricker

G.

3

HEREBY CERTIFY.
[illegible]ON, CLERK

Kenner, La.

February 12, 1941

Mr. John Dale, Jr.
Vidalia, Louisiana.

Dear Mr. Dale:-

Yours of the 8th received.

I am sorry if I have said anything in my letter that you have taken as criticism. That is something I never do to anyone because we all, more or less, want to be friends, and, personally, I certainly want to be your friend and want you to be mine. I only tried to state what my banker told me over the phone, he said it was outrageous. Whether he knows what he is talking about or not I don't know.

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Yours very truly,

J. P. MCRGAN

J. P. MCRGAN

G

JPM/G
CC: Mr. R. M. Stricker

HEREBY CERTIFY. 3
TON, CLERK
BY:
Ruby L Short
Deputy Clerk

1.34

55 pltffs. Ex. 87

23 41-M

February 12, 1941

Mr. R. M. Stricker
Woodville, Mississippi

Dear Sir:-

Enclosed is notice I received this morning. I really do not understand same, therefore, I am sending it to you (Tax sale of property to R. M. Stricker).

Also enclosing copy of letter to Mr. John Dale, Jr., whom I think is a wonderful fellow and do not want to lose his friendship for $25.00 or $30.00 or to think for one minute I was not more than satisfied with what he did. Therefore, read the letter and see what you think of it then get busy and try to thrash same out with the other parties.

Yours very truly,

JPM/G
ENCL 3

J. P. MORGAN

23

41-M

February 12, 1941

Mr. R. M.Stricker
Woodville, Mississippi

Dear Sir:-

Enclosed is notice I received this morning. I really do not understand same, therefore, I am sending it to you (Tax sale of property to R. M. Stricker).

Also enclosing copy of letter to Mr. John Dale, Jr., whom I think is a wonderful fellow and do not want to lose his friendship for $25.00 or $30.00 or to think for one minute I was not more than satisfied with what he did. Therefore, read the letter and see what you think of it then get busy and try to thrash same out with the other parties.

Yours very truly,

JPM/G
ENCL 3

J. P. MORGAN

TRUE COPY, I HEREBY CERTIFY.
LORYCE E. [illegible]TON, CLERK
BY: Ruby L Short
Deputy Clerk

Plaintiff's Exhibit No. 87

February 12, 1941

Mr. John Dale, Jr.
Vidalia, Mississippi

Dear Mr. Dale:-

Yours of the 8th received.

I am sorry if I have said anything in my letter that you have taken as criticism. That is something I never do to anyone because we all, more or less, want to be friends, and, personally, I certainly want to be your friend and want you to be mine. I only tried to state what my banker told me over the phone, he said it was outrageous. Whether he knows what he is talking about or not I don't know.

I am sending a copy of this letter to Mr. R. M. Stricker and suggesting that we all get together and pay those charges. I cannot see why it should be all one man's fault, regardless of whose it is. We paid the price asked for the land and if I would have thought it would have been like those charges I certainly would have made things different, but I don't blame you and I know you will not have to stand it, because, I figure you are a disinterested party as far as money transactions are concerned.

I would suggest your sending the man who sold the land 1/3, Mr. J. M. Jones 1/3, and 1/3 to myself, and see what effect it has, but please do not think I wrote the letter in an unpleasant mood, Furthermore, I am not going to do anything that I would think would cause you to think less of me knowingly.

Yours very truly,

J. P. MORGAN

JPM/G
CC Mr. R. M.Stricker

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:
Ruby L Frost
Deputy Clerk

COPY

57

DALE, DALE & DALE
Attorneys at Law
Owners of Abstract Books
Vidalia, Louisiana

September 16, 1941

Mr. J. P. Morgan
Kenner, Louisiana

Dear Mr. Morgan:-

I have a proposition for the purchase of your Espersons lands, excepting therefrom all timber, and would appreciate your letting me know your best price and terms, allowing a 5% commission for making the sale.

Best personal regards,

Sincerely,

DALE, RICHARDSON & DALE

John Dale, Jr.

John Dale Jr.

D2/hwe

TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:
Ruby Lilhot
Deputy Clerk

Exhibit P-34

Plaintiff's Exhibit No. 34

Kenner,
Louisiana.
January, 14th, 1947

Messrs. J. P. Morgan and R. M. Stricker.
Woodville, Miss,
c/o A. H. Jones's Office.

My Dear Sirs:-

We wish to offer, the sum of Eighty Thousand Dollars, for any and all timber, which when cut during a term of five years from date, will measure across the stump, 14 inches in diameter and up, which timber, is now standing and being upon the Esperanze Plantation and now owned by you.

Very truly yours,

Louisiana Box and Lumber Co.

By: Catherine M. Gonzales

Plaintiff's Ex. 118

A TRUE COPY, I HEREBY CERTIFY.
LOYCE E. WHARTON, CLERK
BY:
Ruby L Short
Deputy Clerk

Plaintiff's Exhibit No. 118

EXHIBIT "S-4"

No. 25383

J. P. MORGAN

to

GENERAL BOX COMPANY

FILED at 9:35 A. M.

TIMBER DEED

March 31, 1947

STATE OF LOUISIANA

PARISH OF JEFFERSON

BE IT KNOWN AND REMEMBERED, that on this day before me, the undersigned Notary Public, duly commissioned and qualified in and for said Parish and State, there personally came and appeared J. P. MORGAN, married only once and then to MARGARET K. MORGAN, with whom he is now living undivorced, and a resident of Kenner, Louisiana, who declared to me, Notary, in the presence of the two undersigned, competent witnesses, that he does, by these presents, sell, transfer, convey and deliver with full warranty of title and with complete subrogation as to all rights of action in warranty against all former owners, unto the GENERAL BOX COMPANY, INC., a Delaware corporation, having its principal place of business in Chicago, Cook County, Illinois, with plant located at Natchez, Mississippi, all of the following described property situated in Concordia Parish, Louisiana, to-wit:

All timber situated, lying or being upon the hereinafter described property, measuring fourteen inches (14") and up in

all of this exhibit

diameter between the bark across the stump, the narrow way, at the time of cutting, no stumps to be cut less than twelve inches (12") from the ground, situated on the following described property, to-wit:

The Esperanze Plantation, comprising all of Sections five (5), six (6), seven (7), eight (8), Nine (9),, thirty-eight (38), thirty-nine (39), and forty (40) in township five (5) Range nine (9) and all of Township five (5) Range (10); and also tract containing 40 acres situated in sections fifty-three (53) and fifty-four (54) of township five (5) range nine (9) bounded as follows: beginign at the north east corner 21-1/2 degrees west 20 chains, along the old levee, thence south 59 degrees west 23.50 chains; thence south 40 degrees west 21 chains, thence north 71 degrees east, along the north line of section 10, township five, range nine, to the northwest corner of said section nine, township 5, range 9, thence north 89-1/2 degrees east, along the north line of said section nine, 23.52 chains, to the point of begining; said 40 acres being the same tract sold by S. B. Yeager to J. W. Walker by act dated January 6, 1906, recorded in deed Book X, page 240 of the records of Concordia Parish, Louisiana.

Said timber on Esperanze Plantation here conveyed includes all of the accretaton and batture formed adjacent to said above named sections, except that there is excepted

and reserved and not hereby conveyed the timber on batture and land conveyed by J. W. Walker to W. B. Roberts and J. L. Wilson by deed dated March 23, 1909, and recorded in deed book Y, page 35 of the records of said Concordia Parish, La., to which act reference is here made for a detailed description of said tract; and also excepting the Island conveyed by J. W. Walker to Roberts and Wilson by deed dated November 19th, 1909, and recorded in deed book Y, page 142, of said records.

And also, excepting the timber on batture lands conveyed by Junkin and Gregory to Hogue et als as per deed recorded in Deed Book CC, page 410 of the records of Concordia Parish, La. to which reference is here made for more particular description.

There is excepting and not included in this transfer Section 12, T. 5 N.., Range 10 E., heretofore reserved by the United States for Schools.

Said Esperanze Plantation includes all of what is known as the Esperanze and Pecan Plantations, and the Guice, Canaan and Yeager tracts, all of said plantations and tracts being now included under the name of "Esperanze Plantation"; said described timber on Esperange Plantation here conveyed being counded north by Henderson- Ashley Plantation and the Mississippi River; east by the Mississippi River; South by said tract sold to Roberts & Wilson, and west by lands now owned by Mrs. Barker and the Mississippi River, and being said timber on the same

property acquired by said vendor from Hiram F. Gregory by act of sale dated June 10, 1935, and recorded in Deed Book FF, page 231 of the records of said Concordia Parish, La., it being the intention of this act convey, and there being hereby conveyed, all of thr said described timber on property acquired by said vendor in said act, whether particularly described herein or not.

TO HAVE AND TO HOLD the said timber as hereinbefore described unto said purchaser, its successors and assigns, forever.

The price and consideration for which this sale is made is the sum of EIGHTY-SEVEN THOUSAND FIVE HUNDRED SIXTY-EIGHT AND 33/100 ($87,568.33) DOLLARS, of which the sum of SIXTY-FIVE THOUSAND EIGHTEEN AND 33/100 ($65,818.33) DOLLARS has been paid in cash, receipt of which is hereby acknowledged nad a fullacquittance granted therefor, and the balance of the purchase price namely, $21,750.00, is to be represented by two (2) certain promissory notes, each for the sum of Ten Thousand Eight Hundred Seventy-five and No/100 ($10,875.00) Dollars, Note 1 being due one (1) year from date, and Note 2 being due two (2) years after date, all of said notes to be dated Vidalia, Louisiana, of even date with the act of acceptance and all payable at the Commercial Bank, Woodville, Mississippi, and all of said notes being payable to J. P. Morgan, which notes are to be secured by vendor's privilege hereby retined by vendor and a special mortgage is to be executed on said timber securing the payment of siad notes, which notes are to provide for the payment of eight (8%)

per cent per annum interest after maturity and are to further 1/2rovide for the payment of ten (10%) per cent upon the principal and interest thereof if not paid at maturity and placed in the hands of an attorney for collection. It being understood and agreed, and said act of acceptance is to provide, that default in the payment of any one note shall mature all of said notes; which notes are to be paraphed "Ne Varietur" by the Notary who passes the act of acceptance granting the mortgage and vendor's privilege herein stipulated, and are to be governed by the laws of the State of Louisiana; which act is to contain the Pact de non-aliendo and is to improt a confession of judgment.

It being understood, however, that the vendee shall have the right to cut and remove the timber acquired on or before the maturity of said notes without applying the proceeds derived therefrom to said notes; however, this right expires after maturity.

The vendee is to have five (5) years from the date of the act of acceptance for the removal of said timber, and at the end of said period, all timber cut and removed is to revert to vendor. Vendee is to have full right of ingress and egress over said property for the removal of said timber.

The tax certificate and mortgage certificate required by law are waived, and me, Notary, held harmless for the non-production of the same.

IN EVIDENCE WHEREOF, said appearer has signed this act at my office, in the presence of me, Notary, and Lola Stonlig and M. J. Domineque, the two undersigned, competent witnesses, who sign as such, on this, the 10th day of February, 1947, after due reading of the whole act.

WITNESSES:

Lola Stonlig J. P. Morgan

M. J. Domineque

Edward J. Stonlig

NOTARY PUBLIC

My commission expires at death.

ACT OF ACCEPTANCE,

RECOGNIZING VENDOR'S PRIVILIGE AND GRANTING A

SPECIAL MORTGAGE

STATE OF ILLINOIS

COUNTY OF COOK

CITY OF CHICAGO

BE IT KNOWN AND REMEMBERED that on this day, before me the undersigned Notary Public, duly commissioned and qualified in and for said City, County and State, there personally came and appeared the GENERAL BOX COMPANY, INC., a Delaware corporation, having its principal place of business in Chicago, Cook County, Illinois, appearing herein through N.W. Embry, President and Paul E. Duzeski, Secretary, thereof, herein

79.

jointly acting for and on behalf of said Corporation, and duly authorized to act therefor by virtue of the by-laws of said Corporation, and extract certified copy of which is annezed hereto and made a part hereof, who declared unto me, said Notary, in the presence of the two undersigned, competent witnesses, as follows, to-wit:

That appearers have read the foregoing timber deed from J. P. Morgan to the General Box Company, Inc., and hereby accept same in all its parts and clauses, under which there was conveyed to the General Box Company, Inc., the following described property, to-wit:

All timber situated, lying or being upon the hreinafter described property, measuing fourteen inches (14") and up in diameter between the bark across the stump, the narrow way, at the time of cutting, no stumps to be cut less than twelve inches (12") from the fround, situated on the following described property, to-wit:

The Esperanze Plantation, comp rising all of Sections Five (5), six (6), seven (7), eight (8), nine (9), thirty-eight (38), thirty-nine (39), and forty (40) in township five (5), range range (10); and also tract containing 40 acres, situated in sections fiftythree (53) and fifty-four (54) of township five (5) range nine (9) bounded as follows; begining at the Northeast corner of section 9, township 5 range 9 and running thence north 21-1/2 degrees west 20 chains along an old

levee; thence south 59 degrees west 23.50 chains; thence south 49 degrees west 21 chains thence north 71 degrees east, along the north line of section 10, township five, range nine, to the northwest corner of said section nine, township 5, range 9; thence north 89-1/2 degrees east, along the north line of said section nine, 23.52 chains, to the point of begining; said 40 acres being the same tract sold by S. B. Yeager to J. W. Walker by act dated January 6, 1906, recorded in deed book X, page 240, of the records of Concordia Parish, Louisiana.

Said timber on Esperanze Plantation here conveyed includes all of the accretion and batture formed adjacent to said above named sections, except that there is excepted and reserved and not hereby conveyed the timber on batture and land conveyed by J. W. Walker to W. B. Roberts and J. L. Wilson by deed dated March 23, 1909, and recorded in deed book Y, page 35 of the records of said Concordia Parish, La., to which act reference is here made for a detailed description of said tract; and also excepting the Island conveyed by J. W. Walker to Roberts and Wilson by deed dated November 19th, 1909, and recorded in deed book Y, page 142 of said records.

And also excepting the timber on batture lands conveyed by Junkin and Gregory to Hogue et als as per deed recorded in Deed Book CC, page 410, of the records of Concordia Parish, La. to which reference is here made for more particular description.

There is excepted and not included in this Transfer Section 12, T. 5 N., R. 10 E. hereto reserved by the United States for schools.

Said Esperanze Plantation includes all of what is known as the Esperanze and Pecan Plantation, and the Guice, canaan and yeager tracts, all of said Plantations and tracts being now included under the name of "Esperanze Plantation"; said described timber on Esperanze Plantation, here conveyed being bounded north by Henderson-Ashley Plantation and the Mississippi River; east by the Mississippi River; South by said tract sold to Roberts and Wilson, and west by lands now owned by Mrs. Barker and the Mississippi River, and being said timber on the same property acquired by said vendor from Hiram F. Gregory by act of sale dated June 10, 1935, and recorded in Book F, Page 231 of the records of said Concordia Parish, La., it being the intention of this act to convey, and there bing hereby conveyed, all of the said described timber on the property acquired by said vendor in said act, whether particularly described herein or not. Now, in order to represent the balance due on the purchase price of said timber namely,

TWENTY-ONE THOUSAND SEVEN HUNDRED FIFTY AND NO/100 ($21,750.00)) DOLLARS, said appearers have this day executed, for and on behalf of the General Box Company, Inc., its two (2) certain promissory notes as described in the foregoing timber deed, each being dated Vidalia, Louisiana, of even date with this

act, each being for the sum of Ten Thousand Eight Hundred Seventy-Five ($10,875.00) and No/100 and NO/100 DOLLARS, and each payable to J. P. Morgan at the Commercial Bank, Woodville, Mississippi, note 1 being due one (1) year after date, and Note (2) being due two (2) years after date; which notes provide for the payment of eight (8%) per cent per annum interest after maturity, and further stipulate for the payment of ten (10%) per cent upon the principal and interest thereof, as attorney's fees, if not paid at maturity and placed in the hands of an attorney for collection.

It is being understood and agfeed, and said notes so provide, that default in the payment of any one note shall mature all of said notes; which notes were by me, Notary, this day paraphed "Ne Varietur" in order to identify the same herewith, and which notes are to be governed by the laws of the State of Louisiana.

Now, in order to secure the prompt and punctual payment of said notes at their maturity together with interest, attorney's fees and costs, a special mortgage is hereby stipulated on said timber and a vendor's privilige recognized in favor of J. P. Morgan, or any further holder of said notes.

Appearers agreeing, for said Corporation, not to alienate, deterioriate or encumber said property to the prejudice of this act (except as granted in th foregoing timber deed); which imports a confession of judgment and waives the benefit of appraisement at the option of the holder of said notes.

The mortgage certificate and tax certificate required by law are

are waived, and me, Notary, held harmless for the non-production of the same.

IN EVIDENCE WHEREOF Said appearers have signed this act, at my office, for and on behalf of said corporation, in the presence of me, Notary, and Josephine J. Newhouse and Dorothy Epps, the two undersigned, competent witnesses, who sign as such, on this, the 21st day of February, 1947, after due reading of the whole act.

WITNESSES:

Joseph J. Newhouse — GENERAL BOX COMPANY, INC.

Dorothy Epps — By: N. W. Embry, President

Irene Laws — By: Paul E. Duzeski
Notary Public (seal) — Secretary

My Commission expires Sept 8, 1948.

($96.80 U. S. Revenue Stamps attached and cancelled)

A true copy of the original recorded March 31, 1947.

/s/ V. P. Campbell
Clerk of Court

A true copy attest:

/s/ Jean Brewer
Deputy (seal)

. . . . . .
- - - - - - - - - - - - - -

TRUE COPY, I HEREBY CERTIFY.
[illegible]E E. WHARTON, CLERK

Ruby L. Short
Deputy Clerk

RIGHT OF WAY AGREEMENT
(Louisiana)

Right of Way No. 2

Section No. 2-17-117

PARISH OF CONCORDIA KNOW ALL MEN BY THESE PRESENTS:

DISTRICT NO._____

THAT J. P. Morgan- hereinafter called "Grantor", whether one or more, and INTERSTATE OIL PIPE LINE COMPANY, a Delaware corporation, represented herein by S. R. Simmons, duly authorized, hereinafter called "Grantee",

WITNESSETH:

For and in consideration of 100 cents per lineal rod for 336 rods in the sum of Three Hundred Thirty-six and No/100 ($336.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged and due acquittance and discharge given for the same, Grantor does hereby grant and convey unto Grantee, its successors and assigns, a right of way or servitude for the purpose of laying, maintaining, operating, patrolling, altering, repairing, renewing and removing in whole or in part a pipe line for the transportation of crude petroleum, its products and derivatives (whether liquid or gaseous) and/or mixtures thereof, together with the necessary fixtures, equipment and appurtenances (9ncluding telephone and telegraph lines, or either of them, with necessary poles, equipment, guy wires and anchors, and the right at all times to trim trees and remove other obstructions along said lines so as to prevent damage or interference with their efficient operation)over, through, upon, under

Plaintiff's Exhibit No. 25.

1/4 98.a

under and across the following described land situated in Concordia Parish, Louisiana, to-wit:

Sections 6 and 7, Township 5 North, Range 9 East, Concordia Parish, Louisiana

(Documentary Stamps in amount of 55¢)

together with the right of ingress and egress to and from said right of way thereon and over said above described land for any and all purposes necessary to the exercise by Grantee of the rights herein granted.

Grantee, its successors and assigns, may at any time lay additional lines of pipe alongside the first line hereinabove provided for upon payment of like consideration for each additional line so laid and subject to the same conditions; provided that all pipe lines constructed under this grant shall be confined to a strip of ground not exceeding 30 feet in width, the center line of which shall be the center of the first pipe line hereinabove installed.

TO HAVE AND TO HOLD the right of way and servitude unto the INTERSTATE OIL PIPE LINE COMPANY, its successors and assigns.

The Grantor, for himself, his heirs and assigns, covenants that he will not interfere with the construction of the line and that he will not damage the pipe or other property of Grantee placed thereon, maintenance and operation of said line. Said damage, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons, one to be appointed by Grantor, one by Grantee, and

2

successors and assigns, and the third by the two persons aforesaid; and the unanimous award of such arbitrators, in writing, shall be final and conclusive.

The undersigned Grantor reserves the right to the full use and enjoyment of said premises except as the same may be necessary for the purposes herein granted; provided that said Grantor shall not erect over any line or lines of Grantee any improvement of a nature such as to interfere with the rights hereby granted.

- - - -

Note: Two witnesses should attest the signature of each party. Either the Grantor or one of the subscribing witnesses should sign proper acknowledgment on reverse side of this form.

A-174 2-17-117
Cranfld -Esper Pt (La Side 8")
Tract 2

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF Louisiana

PARISH OR COUNTY OF East Baton Rouge

BEFORE ME, the undersigned authority, this day personally appeared J. A. C'Neal, to me personally known to be the identical person whose name is subscribed to the foregoing instrument as an attesting witness, who being first duly sworn, on his oath, says: That he subscribed his name to the foregoing instrument as a witness, and that he knows J. P. Morgan, the Grantor named in said instrument, to be the identical person described therein, and who executed the same, and saw him sign the same as his voluntary act and deed, and that he, the said J. A. C'Neal, subscribed his name to the same at the same time as an attesting witness.

(s) J. A. C'Neal
(Signature of the same witness)

Sworn to and subscribed before me, this 1st day of July, 1952.

(s) W. G. Randolph

Notary Public in and for East Baton Rouge Parish or County,

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF Louisiana

PARISH OR COUNTY OF East Baton Rouge

BEFORE ME, the undersigned authority, this day personally appeared J. A. C'Neal, to me personally known to be the identical person whose name is subscribed to the foregoing instrument as an attesting witness, who being first duly sworn, on his oath, says: That he subscribed his name to the foregoing instrument as a witness, and that he knows J. P. Morgan, the Grantor named in said instrument, to be the identical person described therein, and who executed the same, and saw him sign the same as his voluntary act and deed, and that he, the said J. A. C'Neal, subscribed his name to the same at the same time as an attesting witness.

(s) J. A. C'Neal
(Signature of the same witness)

Sworn to and subscribed before me, this 1st day of July, 1952.

(s) W. G. Randolph

Notary Public in and for East Baton Rouge Parish or County, State of Louisiana

My commission expires Indefinitely

A true copy attest:
/s/ Jean Brewer, Deputy (seal) 98 d

74

No. 43319

J. P. Morgan

To

Interstate Oil Pipe Line Co.

Right of Way Grant

FILED AT

CONCORDIA PARISH, LA.

2:25 O'Clock
Clerk of Court
Aug 21, 1952 PM

OFFICE

/s/ V. P. Campbell

Cl. of Court

Deed Bk-M. Y.

Pg. 106

A true copy attest:

/s/ Jean Brewer
Deputy

- - - - -

TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:

Ruby L Short

Deputy Clerk

Deputy Clerk

TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:

78

RIGHT OF WAY GRANT
(Louisiana Rev. 5-52

STATE OF LOUISIANA PARISH OF Concordia

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, hereinafter called GRANTOR, (whether one or more) in consideration of Three Hundred Seventy-nine and no/100 - - -$(379.00) DOLLARS cash in hand paid, receipt of which is hereby acknowledged, does hereby grant and convey unto INTERSTATE OIL PIPE LINE COMPANY, a Delaware corporation, with principal office at Shreveport, Louisiana, hereinafter called GRANTEE, a servitude or right of way for the purpose of constructing, maintaining, operating patrolling, (including aerial patrol) altering, repairing, renewing and removing in whole or in part a pipe line for the transportation of crude petroleum, its products and derivatives, whether liquid or gaseous, together with the necessary fixtures, equipment and appurtenances across the following described land situated in said State and Parish, to-wit:

Sections 7, 8, 9, and forty (40) acres, called the Yeager tract; in Sections 53 and 54 all in T5N- R9E

- - - - - - - - -Section - - - - - -Twp - - - - - -Rge- - - - -

together with the right of ingress and egress to and from said right of way over and across said lands and adjacent lands of GRANTOR for any and all purposes herein granted, with the right to maintain the right of way clear of trees, undergrowth, brush and other obstructions so as to prevent damage or

interference with the efficient operation and patrol of the pipe line constructed under this grant.

GRANTEE may construct additional lines of pipe, subject to the same rights, terms and conditions as apply to the original line, upon payment to the GRANTOR of a like consideration per rod for each additional line so laid; provided that additional pipe lines constructed shall be located approximately parallel and at a distance of not more than twenty-five (25) feet from the center of the first pipe line hereafter installed. Payment for additional lines may be made by check of GRANTEE preceding or subsecuent to the construction of such additional lines.

All pipe lines constructed under this agreement shall be buried through cultivated land so that they will not interfere with ordinary cultivation and GRANTEE shallpay for all damage to crops, fences, timber and livestock which may be caused by the construction, repairing or removing said lines, which pay ment shall be made after completion of the work.

GRANTOR reserves the right to the full use and enjoyment of said premises except as the same may be necessary for the purposes herein granted; provided that GRANTOR shall not erect over any line or lines of GRANTEE any improvements, lake or ponds of a nature such as to interfere with the rights hereby granted.

Nothing herein shall be construed as a conveyance of any part of the mineral rights underlying the above described property and the servitude granted herein is subject to any

valid and duly recorded oil, gas and mineral lease.

- - - -

A.F.E. No.	Line Name or Location Code No.	R/W No.
333	2-17-117	2
Size	Rods	Field or Pool Map No.
4"	379	
CHECK No.	Paid By	
50	Tom D. Ford	

No. 44184
J. P. Morgan

TO-

Interstate Oil Pipe Line Co.

RIGHT OF WAY GRANT

FILED AT

CONCORDIA Parish, La.
10:50 O'clock

CLERK OF COURT
NOV 18, 1952 A. M.

OFFICE
/s/ V. P. Campbell
Cl. of Court

Deed Bk. N-Y Pg. No. 384 (illegible)

A true copy attest:

/s/ Jean Brewer

Deputy (seal)

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY: Ruby L Short
Deputy Clerk

Received of J. P. Morgan of Kenner, Louisiana, one check for $5,000.00 on the Commercial Bank of Woodville, Miss., and two checks aggregating $21,500.00 (Twenty-one Thousand Five Hundred Dollars), one on the National Bank of Commerce of New Orleans, Louisiana, and the 2nd, on the Whitney National Bank of New Orleans, Louisiana, the said three checks aggregating the total sum of Twenty-six Thousand Five Hundred ($26,500.00) Dollars.

These checks are to be collected by me and the proceeds held by me until I can certify to said J. P. Morgan that he acquires clear and valid title to the Esperanze Plantation in Concordia Parish, Louisiana, conveyed or to be conveyed him by A. H. Campbell of Memphis, Tennessee.

This is given to carry into effect various transactions between said A. H. Campbell and Orrin James and J. M. Jones now pending and said money so delivered me is only to be paid upon the completion of the several deals between the parties herein named.

It is understood that I discharge all obligations which may be due J. P. Morgan hereunder by the delivery to him of the deed of conveyance to said Esperanze Plantation now held by me.

It is not contemplated that the said John Dale, Jr., shall p ass upon the title to said property, the said J. P. Morgan being now satisfied with the same.

Signed at Vidalia, Louisiana, this 13th. day of January, 1941.

John Dale Jr.

[illegible], I HEREBY CERTIFY.
[illegible] WHARTON, CLERK
BY:
Ruby L Ghost
Deputy Clerk

Defendant's Exhibit No. 3

Exhibit D-3

Pg 25

CERTIFIED COPY

D. C. Form No. 30

United States of America

SOUTHERN DISTRICT OF Mississippi

R. M. STRICKER

ss: VS. CIVIL ACTION No. 730

J. P. Morgan

I, Loryce E. Wharton, Clerk of the United States District Court in and for the Southern District of Mississippi, do hereby certify that the annexed and foregoing is a true and full copy of the original

1. Plaintiff's Exhibit No. 20- being a deed dated 12-30-40 from A. H. Campbell to J. P. Morgan;
2. Plaintiff's Exhibit No. 39- being a letter from A. H. Camp bell to John Dale dated 12-31-40;
3. Plaintiff's Exhibit No. 214- being three letters- (1) Letter from J.P. Morgan to John Dale Jr., dated 1-22-41, (2) Letter from John Dale Jr., to J. P. Morgan dated 2-8-41, and (3) letter from J. P. Morgan to John Dale Jr., dated 2-12-41.
4. Plaintiff's Exhibit No. 87- being two letters, (1) Letter from J. P. Morgan to R. M. Stricker, dated 2-12-41; (2) Letter from J. P. Morgan to Dale dated 2-12-41.
5. Plaintiff's Exhibit No. 34- being Letter from John Dale, Jr. to J. P. Morgan, dated 9-16-41.
6. Plaintiff's Exhibit No. 118- being Letter from Louisiana Box & Lumber Company to Morgan and Stricker signed by Catherine M. Gonzales, dated 1-14-47.
7. Plaintiff's Exhibit No. 23- being Timber deed from Morgan to General Box Company, dated 3-31-47.

8. Plaintiff's Exhibit 25- being Right of Way Deed from Morgan to Interstate Oil Pipe Line Co. dated 6-28-52

9. Plaintiff's Exhibit 27- being Right of Way Deed from Morgan to Interstate Oil Pipe Line Co. dated 10-31-52; and

10. Defendant's Exhibit No. 3- being receipt for checks from Dale to Morgan, dated 1-13-41;

All of which appear in the record on appeal to the Circuit Court of Appeals for the Fifth Circuit; a copy of said Record on Appeal now

1. Plaintiff's Exhibit No. 20- being a deed dated 12-30-40 from A. H. Campbell to J. P. Morgan;
2. Plaintiff's Exhibit No. 39- being a letter from A. H. Camp bell to John Dale dated 12-31-40;
3. Plaintiff's Exhibit No. 214- being three letters- (1) Letter from J.P. Morgan to John Dale Jr., dated 1-22-41, (2) Letter from John Dale Jr., to J. P. Morgan dated 2-8-41, and (3) letter from J. P. Morgan to John Dale Jr., dated 2-12-41.
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9. Plaintiff's Exhibit 27- being Right of Way Deed from Morgan to Interstate Oil Pipe Line Co. dated 10-31-52; and

10. Defendant's Exhibit No. 3- being receipt for checks from Dale to Morgan, dated 1-13-41;

All of which appear in the record on appeal to the Circuit Court of Appeals for the Fifth Circuit; a copy of said Record on Appeal now

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Vicksburg, Mississippi this 14th day of December, A. D. 19 59

LCRYCE E. WHARTON
Clerk.

By Ruby L. Short
RUBY L. SHORT Deputy Clerk.

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 26 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (MRS. MARGARET KOEHLER MORGAN, EDWARD C. MORGAN AND EVELYN MORGAN WIEMER), SUBSTITUTED AS RESPONDENTS IN THE PLACE AND STEAD OF J. P. MORGAN, DECEASED,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Submitted By:

W. H. TALBOT,
808 Whitney Building,
New Orleans, Louisiana,
E. L. BRUNINI,
C. DELBERT HOSEMANN, of
BRUNINI, EVERETT, GRANTHAM & QUIN,
First National Bank Building,
Vicksburg, Mississippi.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1959.

No. 614.

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (MRS. MARGARET KOEHLER MORGAN, EDWARD C. MORGAN AND EVELYN MORGAN WIEMER), SUBSTITUTED AS RESPONDENTS IN THE PLACE AND STEAD OF J. P. MORGAN, DECEASED,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPENING STATEMENT.

This is the same old story. For fifteen years a person owns land of relatively small value, his title and possession being undisputed. Oil is then discovered, the value booms, and then comes the forgotten claims of ownership.

In this case Petitioner Stricker sought to and failed to prove a shotgun type of claim to land located in Louisiana. The well-reasoned opinion of the District Court contains a full statement of the facts and a complete application of the law, and was made after weeks of trial and a careful study of all of the evidence. The factual statement contained in Stricker's Petition (pp. 5-30) conveniently ignores the entirety of the evidence. (R. Vol. 12, p. 2282.) (*R. M. Stricker v. J. P. Morgan, et al.*; 158 F. Supp. 830 (1958).) A careful review of the decision of the Trial Court was made by the Circuit Court and the Trial Court was in all things sustained. (*R. M. Stricker v. J. P. Morgan, et al.*, 268 F.2d 882 (CCA 5th; 1959).)

II.

JUDICIAL PROCEEDINGS.

A.

In the District Court.

The opinion of the Trial Court is quite lengthy and will not be reproduced here. The full opinion may be found at page 1 of Appendix I to Petition of Stricker.

In short, the Trial Court found that there was no partnership agreement between Petitioner Stricker and Respondent Morgan and that Petitioner Stricker knew and understood at all times that he had no interest in the land.

Here follows a summation of the Trial Court's findings:

"In short I make the following finding of facts and conclusions of law:

1. There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperance Plantation nor did such agreement arise from a course of dealings between the parties. Plaintiff knew and understood that he had no interest in Esperance Plantation beyond a participation in the profits from the sale of the timber.

2. In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff.

3. Plaintiff within his books and records or upon his income tax returns never treated any income received from the various deals and transactions between him and defendant as partnership income. Moreover, the method of handling the transactions by the parties negatives the existence of any partnership agreement between plaintiff and defendant. Each transaction stood on its own facts and was separate and distinct from any other transaction.

4. Plaintiff knew and understood from the date of the purchase of the Esperance Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber.

5. Plaintiff claimed no ownership of the Esperance land in a letter in 1948 to the Internal Revenue Service, nor in the oil, gas and mineral lease existing on the land.

6. Defendant has had the record title and has been in full, open possession of the Esperance Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperance land from that date.

The plaintiff having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

The Trial Court further found that from the facts, circumstances and conduct of the parties that Petitioner Stricker failed to meet his burden of proof and was not entitled to recover upon any theory advanced by him.

"The fair inference from all the facts, circumstances and conduct of the parties is that there was no general partnership agreement in existence between plaintiff and defendant, nor did any such relationship arise from the dealings between the parties. Plaintiff accepted additional commissions and bonuses in the negotiation of oil, gas and mineral leases in transactions in which Plaintiff and defendant were involved. These commissions and bonuses were over and beyond the share of defendant in the bonus and delay rentals from these leases. Plaintiff never accounted to defendant for these commissions, nor did he offer to share them with defendant."

B.

In the Circuit Court.

The Fifth Circuit Court of Appeals reviewed the decision of the Trial Court and affirmed it in all particulars. The Full Opinion of the Court may be found in Appendix V, page 33 to Petition of Stricker.

The Court in short held:

"In an exhaustive, well written and documented opinion the district judge decided all of the issues in favor of defendant and against plaintiff, and reference is made to his opinion in the case of Stricker vs. Morgan, D.C., 158 F. Supp. 830. The facts are fully and fairly stated in said opinion and, no good purpose would be served by repeating them here. A reading of the briefs and this voluminous record fails to convince us that the court below was clearly erroneous in its findings of fact, which are thus summarized on the last page of the opinion (at page 842):

'There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperanza Plantation nor did such agreement arise from a course of dealings between the parties. Plaintiff knew and understood that he had no interest in Esperanza Plantation beyond a participation in the profits from the sale of the timber.

'In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in

negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff. * * *

"Plaintiff knew and understood from the date of the purchase of the Esperanza Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber. * * *

"Defendant has held the record title and has been in full, open possession of the Esperanza Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperanza land from that date.

"The plaintiff having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

"These facts as found by the court would require a judgment for the defendant whether the rights of the parties were governed by Mississippi law or by Louisiana law."

III.

ARGUMENT

Position 1.

All Issues of Fact were Decided Adversely to Petitioner Stricker by Both the Trial Court and the Circuit Court.

The Trial Court after patiently and thoroughly listening to and observing all of the testimony, personally and exhaustively examining all of the correspondence

documents, books and records, hearing lengthy oral arguments and studying voluminous briefs found all issues of fact against Petitioner Stricker, holding as follows:

> "The plaintiff, having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

The Circuit Court again reviewing the transcript of testimony and all of the exhibits, studying the voluminous briefs of counsel and hearing the oral argument of counsel likewise found the issues of fact adversely to Petitioner Stricker and affirmed the conclusion of the Trial Court.

> "The conclusions reached by the court below were required by law if the facts found by it were supported by the evidence; so that the fundamental question before us remains throughout whether its findings of fact were clearly erroneous. As heretofore stated, we think that its findings were supported by credible evidence. The factual situation with which it dealt was quite involved and the court set forth its findings clearly and in detail in its published opinion. Being convinced from a careful examination of the record and the exhibits that the findings were justified, we decline to set them aside under the clearly erroneous rule."

It is the firmly established rule of this Court that it will accept concurrent findings of the District and Circuit Courts supported by sufficient evidence. *The Linseed King*, 285 U.S. 502, 52 S.Ct. 450 (1932); *Chees-*

borough v. Woolworth, 244 U.S. 72, 37 S.Ct. 579 (1915); *Porto Rico Fertilizer v. Gandia*, 263 U.S. 711, 44 S.Ct. 37 (1923); *Universal Joint Company v. Cadillac*, 299 U.S. 51; 57 S.Ct. 81 (1936).

The Circuit Court commented upon the full opportunity given to Petitioner to meet his burden of proof:

> "This case was presented to the court below—as well as to us—with unusual skill and diligence by the attorneys on both sides. The trial lasted many weeks and recesses were taken so that the parties would have the best possible opportunity to make the fullest presentation of their evidence. The record presents a typical case for the application of the rule which invests the findings of fact by the trial court with the weight which attends the regard appellate courts accord to its opportunity to judge of the credibility of the witnesses.
>
> "Being unable to say that the findings of the court below, so well and fully stated by it, are clearly erroneous, its judgment is
>
> "Affirmed."

As pointed out by the Circuit Court, it fully concurred in the findings of fact of the District Court and this Court should accept those findings.

Position 2.

Even if there had been no Issue of Fact Decided Against Petitioner Stricker the Louisiana Law Governs and Demands a Writing.

A.

The Louisiana Law Applies.

The land in controversy is located in Louisiana.

It has been a basic and fundamental rule of law that where title to real estate is in issue the laws of the state of its situs govern.

This basic rule is set out in *11 American Jurisprudence*, p. 331 at paragraph 31 as follows:

> "From the general principles heretofore stated it naturally follows that all instruments affecting the title to real estate, no matter what their nature, must be governed, as to their execution, construction, and legal sufficiency, exclusively by the laws of the state in which the real estate is situated."

See *Goodrich On Conflict of Laws*, West Publishing Company, St. Paul, Minn., 2nd ed. 1938, page 388.

The Court in *Freedman v. Mass. Mut. Life Insurance Co.*, 81 F.2d 698 (1936) also held:

> "(1) The solution of this question depends upon a preliminary consideration as to whether the law of Michigan is applicable. Appellant attacks the re-

ceivership upon the ground that the contract assigning the rents and providing for receivership is invalid. *This contract was made with reference to specific real property situated in Michigan, and therefore is peculiarly local in character. Federal courts apply the law of the state in which land is situated as to the validity and effect of contracts concerning such land and affecting the title thereto.*" (Italics ours.)

See also *Pennsylvania Company v. Philadelphia Inquirer Co.*, 25 F.2d 701 (1928) and *Thaddeus W. Spindle v. John M. Shreve, et al.*, 112 U.S. 542, 28 L.ed. 512 (1884).

In the instant case the Esperanza transaction took place and was closed in Vidalia, Louisiana. If there was any agreement concerning the purchase of Esperanza, it necessarily took place in Vidalia, Louisiana.

From the authorities, it is settled that all questions concerning the conveyance of Esperanza Plantation, its form and its effect, must be answered by the rules of the law and evidence as pertains to the jurisprudence of the State of Louisiana.

B.

There Must be a Writing.

It is the law in Louisiana that in the absence of a writing, parol evidence is not admissible to establish title to land in Louisiana.

Section 2275 of the *Louisiana Civil Code* provides:

> "*Immovables*—Transfers required to be written—Verbal sales good as between parties on admission by vendor and actual delivery.—Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, *provided actual delivery has been made of the immovable property thus sold.*"

The only time a verbal sale of immovable property can be valid is where there has been actual delivery of the property together with the actual confession of title by the vendor under oath by written interrogatories.

Petitioner Stricker has produced no interrogatories as required by Section 2275 above and there has been no delivery of the land to Petitioner Stricker.

Therefore, since no writing exists, Petitioner Stricker cannot establish title to the Esperanza Land by parol evidence. We repeat, transfers of real property in Louisiana must be in writing.

Section 2276 of the *Louisiana Civil Code* especially sets out the parol evidence rule:

> "*Parol Evidence Relative to Acts*—Admissibility.—Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since."

In Section 2440, *Louisiana Civil Code*, it is provided that sales of immovables can only be made by an authentic act. Any verbal sale of immovables is null and void. Here is the wording of Section 2440:

> "*Immovables—Sale—Method—Verbal Sales.*—All sales of immoyable property shall be made by authentic act or under private signature.
>
> "Except as provided in Article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

It can readily be seen that the *Louisiana Civil Code* recognizes no transfer of immovable property that is not made by authentic act. The conveyance speaks for itself and parol evidence is not admitted to establish title to land.

The strictness of the rule in Louisiana is pointed out in *Fontenot v. Lideau*, 191 La. 540, 186 So. 21 (1938), *Harvey v. Rideau, et al.*, 200 La. 97, 7 So.2d 674 (1942), and *Cernich v. Cernich*, 210 La. 421, 27 So.2d 266 (1946).

In the case of *Smith v. Bell*, 224 La. 68, 68 So.2d 737 (1953), the Court held:

> "It is the well-settled and unbroken rule of law in this state that, in the absence of any allegation of fraud or error, conditions and stipulations beyond those expressed in an authentic act and what may have been said before, or at the time of or since the execution thereof, can be

> proven only by means of a counter-letter or by the use of interrogatories on facts and articles." *Frauton v. Rusca*, 187 La. 578, 175 So. 66, 68 and *Lawrence v. Claiborne*, 215 La. 785, 41 So.2d 680, and authorities cited in both cases."

In the instant case, Petitioner Stricker did not plead or prove the existence of a counter letter or the use of interrogatories to establish his title, but depended entirely on a proving of his interest in and to the Esperanza Land by parol testimony. (Petition, p. 7)

As set forth by the Court in *Smith v. Bell, supra*, the unbroken law of the State of Louisiana does not permit this to be done.

Petitioner Stricker cannot resort to parol testimony.

In *Prescott, et al. v. Prescott, et al.*, 170 La. 23, 127 So. 611 (1930), the Court declared:

> "Parol evidence is inadmissible to create a title in one who never owned the property or to show that the vendee was in reality some other person than the person named in the deed."

A very fine review of the parol evidence rule is found in the case of *Ceromi v. Harris*, 187 La. 701, 175 So. 462 (1937). There the Plaintiff asked to be decreed an owner of a portion of the real property. Plaintiff tried to prove a verbal agreement to establish his claim to an interest in the land. The Court held:

> "Parol evidence to prove defendant's ownership of the property in dispute was properly rejected

by the trial judge. It is axiomatic under the law and jurisprudence of this state that parol evidence is inadmissible to create a title in one who never owned the property or to show that the vendee was in reality some other person than the person named in the act of sale. Civil Code Articles 2275, 2276, 2292, 2440; *Hanby vs. Texas Company*, 140 La. 189, 195; 72 So. 933; *Hodge vs. Hodge*, 151 La. 612; 92 So. 134; *Eberle vs. Eberle*, 161 La. 313, 108 So. 549; *Succ. of Prescott*, 170 La. 233, 127 So. 611; *Landner vs. Cotonio*, 175 La. 352, 143 So. 286.

"And it has been held that the rule finds no exception in the case of a purchase of real estate by an agent with funds alleged to belong to his principal. *Hackenburg vs. Gartskamp*, 30 La. Ann. 898; *Perrault, Tutrix vs. Perrault*, 32 La. Ann. 635; *Stierle v. Kaiser*, 45 La. Ann. 580, 12 So. 839.

"Even where real estate is acquired with stolen money the owner of the money does not become the owner of the property. *George vs. Campbell*, 26 La. Ann. 445.

"The case of *Heiss vs. Cronan*, 42 La. Ann. 213 is analogous to the instant case. In that case plaintiff sued to be recognized as co-proprietor with the defendant to the extent of an undivided half interest in a tract of land purchased in defendant's name at a syndic's sale. The petition alleged that the purchase was made in the name of defendant for the joint interest of defendant and plaintiff, but that defendant fraudulently withheld the property and claimed the whole. Plaintiff offered to prove by parol evidence the verbal acknowledgments of defendant that the facts were as alleged in the peti-

tion. This Court held that the evidence was properly excluded, and that the allegation of fraudulently denying the original bargain did not take the case out of the rule, for a verbal agreement of this sort, touching immovable property, was only capable of being enforced at law when the party to be charged confessed it on oath, and when delivery had been made. Every refusal to carry out an oral agreement for the conveyance of land might in one sense be charged to be fraudulent, and thus the rule would be made nugatory."

Here again the Court has set forth to establish title to real property by verbal agreement, in Louisiana, the party would have to admit the title of the party claimant. There is no other way to establish title to real property in Louisiana by parol evidence.

C.

There Could Have Been No Partnership Or Joint Adventure In The Esperanza Lands In Louisiana.

If the partnership in Louisiana be as to the ownership of land, there must be written, recorded articles of partnership. Section 2836 of the *Louisiana Civil Code* especially provides for the written articles as follows:

"2836 (2807). *Part of Stock in Real Estate*—Written agreement and recordation required.—If any part of the stock of this partnership consist of real estate, it must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter

prescribed with respect to partnership in commendam."

The above section provides not only for written articles of agreement, but they must also be recorded.

Section 2846 of the *Louisiana Civil Code* provides for the contents of the written agreement. Section 2847 for the time allowed for recording and Section 2848 where the articles of partnership should be recorded and that must be done in the parish wherein the land is situated.

Thus from the hereinabove Sections of the Civil Code where partnerships in land in Louisiana are concerned there must be proper written articles of partnership agreement between the parties duly recorded within six days of the date of the agreement in the parish where the land is located.

The Louisiana authorities support this position. *Dunbar v. Bullard*, 2 La. Ann. 810 (1847); *Slocomb v. De Lizardi*, 21 La. Ann. 355 (1869); *Pecot vs. Aronelin*, 21 La Ann. 667 (1869); *Murrell v. Murrell*, 33 La. Ann. 1233; *Lagarde v. Dabon*, 155 La. 25, 98 So. 744; *Gray v. Carter*, 176 So. 885. *Gadlin v. Deggs*, 23 So. 2d 704 (1945).

Again in the case of *Succession of Chapman*, 225 La. 641, 73 So.2d 789 (1954) the Court eliminated the possibility of a partnership in lands in Louisiana because there were no written articles of partnership between the parties. Here are the words of the Court:

"The evidence in the record regarding the existence of a partnership and the farming operations on the lands being conducted by the partnership is very indefinite and insufficient to base a conclusion thereon. Moreover, there was no compliance with Article 2836, LSA-C.C., requiring that if any part of the stock of a partnership consist of real estate *it must be in writing and recorded in the parish where the property is situated.*"

It has been held in Louisiana that the relation of joint adventurers is governed by the same principles constituting the law of partnership.

In the case of *Illinois Central Railroad v. Pope Construction Company*, 90 So.2d 139 (1956) the Court had to decide whether plaintiff and defendant therein were partners or at least joint venturers. There was also an attempt to establish the relationship by proof of a course of conduct.

The Court said:

"(2) We have no doubt that the liability of joint adventurers is the same as is that of partners and accordingly we agree with the statement of our Brothers of the Second Circuit who, in *Young v. Reed*, La. App., 192 So. 780, 785, said:

"'The relation of joint adventurers is governed by the principles which constitute and control the law of partnership.'

In **W & W Oil Co., Inc. v. American Supply Co.**, La. App., 2 So.2d 384, 385, the same court said

> * * * The agreement being for a joint venture is in legal parlance an "ordinary partnership" and governed by the laws applicable to ordinary partnerships.'"

In other words, a joint adventure in the ownership of lands in Louisiana would follow the same rules as to the necessity of a writing and recordation as provided in the statutes on partnerships in lands in Louisiana.

It follows that to allow the introduction of parol evidence, to establish title to land by calling a transaction a joint venture instead of a partnership would entirely defeat both the parol evidence statutes in Louisiana, as well as those for partnerships whose stock would consist of real estate.

The Court so clearly pointed this out in *Stack v. DeSoto Properties*, 221 La. 384, 59 So.2d 428 (1952). In this case it was contended by Stack that since the undertaking was in the nature of a joint venture, that he could use parol evidence to establish his interest. But the Court held:

> "Counsel for plaintiff further insist that, since there was a joint adventure for the acquisition and development of the plantation, Stack, Sr. is entitled to have his interest recognized and that resort to parol evidence is 'permissible for this purpose.'
>
> "There is no merit in the point. To begin with, an examination of the letter of Gilliland readily discloses that there was a joint adventure only insofar as concerns the men engaged in financing the project. Stack, Sr., had rendered services for which

he was to receive an undivided one-half interest in the property, subject to the contingency above pointed out. He was not a partner; he assumed no responsibilities, and was not in anywise liable for the debts of the enterprise. In addition, even were it otherwise, Stack, Sr., could not be permitted, in view of Articles 2275, 2276 and 2440 of the Civil Code to introduce parol evidence to prove an interest in the plantation, *Cernich v. Cernich*, 210 La. 421; 27 So.2d 266, or even to show a waiver of the suspensive condition, *Di Cristina v. Weiser*, 215 La. 1115, 42 So.2d 868."

Even in the *Stack case, supra*, where there was a letter agreement setting out the understanding of the parties, the Court refused to substitute the letter for the requirement that all transfers of property in Louisiana must be in writing. (See *Section 2275, Louisiana Civil Code.*) The Court further held that parol evidence could not be used to add anything further to the letter agreement. (*Section 2276, Louisiana Civil Code.*)

The Court further in the *Stack case, supra*, found that the letter agreement could not be substituted for a transfer of immovable property which can only be made in Louisiana under the terms of Section 2440 which reads:

> "2440 (2415) (N° 1582). *Immovables—Sales—Method—Verbal sales.*—All sales of immovable property shall be made by authentic act or under private signature.

"Except as provided in Article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

Position 3.

Petitioner Stricker is Barred by Prescription and Laches.

The record shows that the deed to the Esperanza Land was made on Decem[illegible] 30, 1940. The oil lease was executed on December [illegible] 1941.

Plaintiff did not bring this action until October, 1955, a period of fifteen years from the date of the deed and fourteen years after the execution of the oil lease. In the meantime, Respondent Morgan moves into his last illness, witness Laub dies, witness Barchus dies, and the memories of many have been dimmed by the passage of time.

There is a 10 year prescription period in Louisiana as set forth in *Section 3474* of the *Louisiana Civil Code*:

"3474 (3437) *Good faith possessor holding by just title—Prescriptive period.*—Immovables are prescribed for by ten years, when the possessor has been in good faith and held by a just title during that time."

Article 3478 of the *Louisiana Civil Code*, provides:

"3478 (3442) (N. 2265) *Good faith possessor by just title. Interdicts, married women, absentees.*

and minors.—He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, married women, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in twenty-two years from the date of the birth of said minor; provided that this prescription, once it has begun to run against a party, shall not be interrupted in favor of any minor heirs of said party. (As Amended. Acts 1920, No. 161; 1924, No. 64.)"

Respondent Morgan has been in full possession of the property for a period in excess of ten years and therefore Petitioner Stricker is barred by limitations and by laches.

As to the question of laches, we quote from the Court in the case of *Comans v. Tapley*, 57 So. 567 (1912):

"(3) The doctrine of laches is founded principally upon the equity maxims 'He who seeks equity must do equity,' 'He who comes into equity must come with clean hands,' and 'The laws serve the vigilant and not those who sleep over their rights.' Its object is to exact of the complainant fair dealing with his adversary. According to Mr. Pomeroy, with whom we fully agree, this doctrine cannot be more concisely and accurately stated than in the language of Stiness, J., in *Chase v. Chase*, 20 R.I. 202, 37 Atl. 804: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another.'"

One of the first principles set forth by the Court in *Comans v. Tapley, supra*, upon which the doctrine of laches is founded is "He who comes into equity must do equity"; "He who comes into equity must come with clean hands".

What did Petitioner Stricker do?

1. Objected to the payment of any part of the expenses attributable to the Esperanza land.
2. Collected lease commissions and special bonus monies from parties in transactions which he and Respondent Morgan were interested without reporting or sharing such income.
3. Collected from Respondent Morgan commissions from transactions which Respondent Morgan was interested in.

How did such a long delay of Petitioner Stricker in filing this action work a disadvantage to Respondent Morgan?

1. Two parties involved in the original transaction of purchase of the Esperanza property have passed from this world.
2. Respondent Morgan has been adjudged an interdict at the time of the trial in the Trial Court and has since passed from this earth.
3. The memory of the witnesses cannot be accurate after the expiration of fifteen years.
4. The destruction, loss and misplacement of books, records and memoranda dating back over such a long period of time is inevitable.

It has been held that an alleged partner asking for an accounting after the expiration of eleven years is barred by laches. See *Marks v. Toney*, 18 So.2d 452 (1944).

The doctrine of laches is well recognized in the State of Louisiana. In *Ziemer, et al. v. City of New Orleans*, 197 So. 754 (1940) the Court said:

> "The Court has recognized estoppel by laches in a number of cases and the doctrine is well established in this State."

Position 4.

There was no Partnership Relationship Existing Between Petitioner Stricker and Respondent Morgan in Reference to the Esperanza Timber.

Timber is severable from the land and when separated becomes a separate estate. Act 188 of 1904 provides:

> "Standing timber shall remain an immovable and be subject to all the laws relative to immovables, even when separated in ownership from the land on which it stands." (*Louisiana Revised Statutes of 1950, 9:1103.*)

The Eperanza timber had been separated from the land at the time of its purchase as shown by the following:

1. A separate consideration was paid for the timber.

2. The timber was acquired separately from the land.

3. The timber was assessed separately from the land and the ad valorem taxes pro rated between the timber and the land.

4. The parties treated the timber as a separate and distinct transaction from the land.

The Louisiana cases recognized that Act 188 of 1904 created two distinct estates—one in the land and one in the timber.

In the case of *Bagents vs. Crowell Long Leaf Lumber Co.*, 20 So.2d 641 (1945), the Court found.

"This separate tenure of different estate is nowhere provided for in our Civil Code which recognizes but two kinds of estates in land, the one corporeal and termed ownership, being the dominion over the soil and all that lies directly above and below it (C. C. Art. 505); and the other incorporeal and termed servitude (including usufruct) being a charge imposed upon the land for the utility of other lands or persons. (C. C. Arts. 533, 646, 647.) See *Wimple vs. Nabors Oil Co.*, 154 La. 483, 97 So. 666, 667. It finds its basis only in the statutory law and enacted by Act No. 188 of 1904, which provides that standing timber shall remain an immovable, and be subject to all the laws * * * * on the subject of immovables, even when separated in ownership from the land on which it stands * * * * *.

"The Supreme Court of our State has on numerous occasions stated that the effect of that Statute was to create two distinct estates and it has re-

cently reaffirmed the doctrine in the case of *Clark vs. Weaver Bros. Realty Corporation*, 197 La. 63, 200 So. 281."

See also:

"*Cooley vs. Meridian Lumber Co.*, 1940, 195 La. 631, 197 So. 255; *Smith vs. Hunt-Lodge Lumber Co.*, 123 La. 959, 49 So. 655, 656; *Brown vs. Hodge-Hunt Lumber Co.*, 162 La. 635, 110 So. 886; *Gray vs. Edgar Lumber Co.*, 138 La. 906, 70 So. 877; *Simmons vs. Tremont Lumber Co.*, 144 La. 719, 81 So. 263; *Kavanaugh vs. Frost Johnson Lumber Co.*, 149 La. 972, 90 So. 275."

It can be seen that Act 188 of 1904 makes the timber that has been separated an immovable and subject to all of the restrictions surrounding conveyances of land.

Petitioner Stricker having failed to conform to these restrictions can have no partnership interest in this immovable.

The fact that Respondent Morgan divided profits with Petitioner Stricker does not make him a partner in the Esperanza timber deal.

The Supreme Court of Louisiana so held in *Collum v. Bruning*, 49 La. Ann. 22 So. 744 (1897):

"Partnership is a special contract, dependent for its creation upon the consent of the parties (Rev. Civ. Code, art. 2805) that that particular relation should be established between them. The mere fact that two persons may both be interested

pecuniarily in the same business venture, and that each gave to it equally his time and attention, by no manner of means carries with it, as a matter of law, the conclusion that they stand towards each other as partners. Consent shown by one person, who has furnished the capital by which certain operations are carried on, that another, who has employed his time, his skill, and his services for their success, should receive one-half of the profits to be derived from the same, is perfectly consistent with the fact that the latter person stands towards the former as a mere employe."

See *Leonard v. Sparks, et al.*, 109 La., 33 So. 594 (1903); *Shushan Bros. v. Drennan & Co., et al.*, 158 La., 104 So. 214 (1925); *Reel v. Brewer*, 6 So.2d 99 (1942); *Glover v. Mayer*, 209 La. 599, 25 So.2d 242 (1946), where the Louisiana courts have held that "merely to divide the profits, or to share profits and loss in speculation or adventure does not make parties partners inter sese, nor will they be liable as such".

In *Labat v. Labat*, 95 So.2d 129 (1957), the Court had under consideration the following strong set of facts and held as follows:

"Appellee in support of his contention that a partnership existed between him and his mother points out that they lived together on the premises, that both had access to the business records, that they had joint bank accounts, that occupational licenses from the city and the state were issued to 'Emile Labat, Jr. and Mrs. Emile Labat', and that they filed partnership income tax returns. All of

these facts may be persuasive, but they are by no means conclusive. The real question is whether as between them there was an intention to establish a patnership. A reading of this record shows no indication that these two parties ever had any intention of entering into a partnership contract. Certainly appellant never consented to enter into such a partnership, and her son never treated her as a partner. What is clear is that after the death of Emile Labat, Sr., the son assumed control of all the community property left by the father, collected the rents, and managed the funeral business as he saw fit."

Here, Petitioner, Stricker certainly never treated Respondent Morgan as a partner. Never did Petitioner Stricker report partnership income upon his income tax returns with Respondent Morgan. Petitioner Stricker consistently took commissions in transactions involving the parties without reporting to Respondent Morgan.

IV.

RESPONSE TO PETITION OF STRICKER.

A.

PETITIONER'S ERRONEOUS FACTS.

The Petition filed herein by Stricker is an intransigent thing. It is difficult, if not impossible, within a reasonable space to answer in any chronological or detailed manner. It contains so many errors of fact, so

many invalid assumptions, and ignores so much of the record that it would be a Herculean task to refer the Court to each and to refute them.

Basically, however, we might point out some of these erroneous assumptions and the fallacies therein apparent. In the first place, it is assumed: "Said agreement entered into by and between Stricker and Morgan on or about November 16, 1935 was a profit and loss sharing contract and agreement which created a status between them that has been denominated by them as a partnership." (Petition, page 7.) Petitioner makes no effort to determine where such agreement was consummated, whether Louisiana or Mississippi.

Inherent in this basic position of Petitioner Stricker is a welter of misconception. The status of a partnership was not created by loose verbiage contained in simple and disconnected correspondence. As the records show and the Trial Court and Circuit Court found, the actions of the parties themselves denied the existence of a partnership and demonstrated that the language was carelessly used.

Nor does this record show the creation of a profit and loss sharing contract or agreement. None such existed. Obviously, all that occurred was that Petitioner Stricker brought to Respondent Morgan a deal (Walnut Grove) which Respondent Morgan decided to finance.

As normally occurs in these things, Petitioner Stricker more than likely casually told Respondent Morgan he might be able to find and bring some more to him and like any ordinary person Respondent Morgan probably told him that he'd be glad to look them over and go into them if they appealed to him. This is all that could have taken place from the very nature of things.

There is nothing in this record to show a general agreement to share in the profits and losses equally. It was pointed out by the Trial Court and the Circuit Court in considerable detail the many different arrangements made by the parties in the various deals and we will not now repeat them.

Out of all of the tremendious amount of correspondence and data Petitioner Stricker hangs his hat on only one letter of Respondent Morgan wherein he is referring to the Knox or Point Breeze timber in Concordia Parish, Louisiana, purchased in December, 1940. (See page 3 of the Petition). This reed is too thin for Petitioner Stricker to lean on, much less build a case.

There is considerable confusion as to just who were involved in the Knox or Point Breeze transaction and on what percentages. Apparently, one Packard, Petitioner Stricker, Respondent Morgan and one Ed Dwyer were all mixed up in it. (Def. Ex. 103) (R. Vol. II, p. 2024) (Pl. Ex. 154 p. 22)

In his income tax returns for the years 1941, 1942, 1943 and 1944, Petitioner Stricker reported simply under "List of Profits", "1/2 Profits on Knox Logs to Mengel Company". (Def. Ex. 56, 57 and 58) (R. Vol. 9, pp. [illegible] 1649.) There is no further identification of this income, and no mingling of this item with any other item.

In fact, Petitioner Stricker deducted 50% Capital Gains from his income tax returns. (Def. Ex. 57) (R. Vol. 9, p. 1683.) *The treatment of the profits from timber sales from Point Breeze as a Capital Gain would negative the existence of any partnership between Petitioner Stricker and Respondent Morgan. If the purchase and sale of timber be the business of the partnership, any income would be ordinary income and not a Capital Gain.*

Louisiana Box required some of the timber from Knox or Point Breeze and then records show the payment of commissions to Petitioner Stricker in the sum of .50 per thousand. (Def. Ex. 44) (R. Vol. 7, p. 1213.)

Such payments to Petitioner Stricker contemplate, of course, the idea of a general partnership.

On March 29, 1944, Petitioner Stricker wrote Respondent Morgan in reference to the Knox or Point Breeze Timber, "I have lost hope of ever trading with Grunby, and as it might appeal to you, for you and Grunby to buy my interest out. . . ". (Def. Ex. 103) (R. Vol. 11, p. 2024.)

Stricker further in this letter continues, as follows:

> ". . . you would be sure that Grunby would and could handle the timber, and incidentally since you buy so much *loumber* from Grunby you would be assured of a real certainty of a much bigger profit in the end. I just mention this, as food for thought, so that you and Mr. Grunby can get your heads together: I am willing to sell on the *baises* of $7500.00 for all timber, and since you can make a lot of money individually out of Grunbys *loumber* if he gets it, I would likely take even less, just any thing to help you accumulate as much as possible, you see you need the money and, of course I don't." (Def. Ex. 103) (R. Vol. 11, p. 2024.)

There is no mention of any partnership, in fact, the language of Petitioner Stricker clearly indicates he had an investment in this timber which he was willing to sell to Grunby and Respondent Morgan for a price.

The second basic invalid assumption of Petitioner Stricker is his interpretation of the use of the words "we" and "us" in certain letters (Petition, pp. 10, 18-29.) He contends that such use without further identification means only Petitioner Stricker and Respondent Morgan. In so doing, he ignores that frequently such use was occasioned by Respondent Morgan's inclusion of his partners in Louisiana Box in some instances and with his son alone in others.

Further, Petitioner Stricker ignores the reality of the situation, since as the Trial Court pointed out, wherever Respondent Morgan referred to Esperanza

and his and Petitioner Stricker's alleged interest therein; he made it clear, crystal clear, that Petitioner Stricker had no interest in the land. (For example, in letter of January 20, 1945, Respondent Morgan wrote "... we agreed that I buy the land ...") (Def. Ex. 22.) On January 2, 1942, Petitioner Stricker made no bones about it in his letter to Respondent Morgan wherein he said "I gave John Dale, Jr., *your* oil lease last Tuesday." (Pl. Ex. 37.)

Another basic fallacy on Petitioner Stricker's part is to ignore the fact that the record shows in writing he knew that he brought to Respondent Morgan only the Esperanza timber purchase and that Respondent Morgan was not obligated at any time by anything that Petitioner Stricker had done or that had previously occurred to buy the land.

Petitioner Stricker knew further that Respondent Morgan alone bought the land for his sole ownership thereof. And this fundamental fact is not changed by use of the confusion in every-day correspondence occasioned by virtue of Respondent Morgan's separate ownership of the land and Petitioner Stricker's interest in the profits from the timber.

Naturally, Respondent Morgan did not use extreme care in ordinary correspondence to pinpoint the precise legal technical situation. It would have been extremely unusual and consequently suspicious had he done so. But where he wrote or talked to Petitioner Stricker about it, the record is clear that Respondent

Morgan positively asserted complete ownership of title to the exclusion of Petitioner Stricker.

Again, we repeat that there is no way to reconcile Petitioner's statement of the facts with this record. The Trial Court or the Circuit Court could not agree with them—nor can we. Our failure to specifically point out each and every instance of erroneous statement of fact is due to the enormous size of this record and the many, many items mistakenly referred to as facts by Petitioner.

The Trial Court and the Circuit Court treated the entirety of this record and their findings are amply supported thereby.

Some reference is made by Petitioner Stricker seeking comfort out of alleged admissions as to his interest in the timber. (Petition, pp. 22, 52-53.) The blunt fact is that the pleadings and proof clearly show that no issue was ever made as to the timber. Respondent Morgan admitting from the beginning that Petitioner Stricker was entitled to one-half of the profits from the sale of the timber. The Trial Court fully discussed this situation and concluded from all of the discussion by the attorneys as follows:

> "So that in the present case and on this motion for Request for Admission of Fact, Mr. Brunini has denied the request for admission of partnership, and since there is no written stipulation on it, I will rule that the burden would be upon the plaintiff to prove the partnership and the ownership

of the timber of course is admitted; *but the status in which it was owned is denied.* The burden will be upon the plaintiff to prove the partnership." R. Vol. 4, p. 696.

B.

PETITIONER'S LAW INAPPLICABLE.

Petitioner cites on pages 4 and 31 of his Petition two cases of *Vyens v. Beckle*, 8 Mart. (O.S.) 11 (1820), *Delamore v. Roger*, 7 La. Ann. 152 (1852), *Malady v. Malady*, 25 La. Ann. 448, all involving claims by concubines for the fruits when they contributed money and labor in purchasing property.

Later the courts in Louisiana failed to recognize even this distinction as to title to real property as shown by the case of *Sparrow v. Sparrow*, 231 La. 966, 93 So.2d 232 (1957) found on page 4 and 34 of the Petition.

In the case of *Porter v. Cooke*, 58 F.2d 1033 (1951), 65 F.2d 637 (1933), 127 F.2d 853 (1942, C.C.A. 5th, cited on page 37 of the Petition, the court held specifically that title to land in Louisiana could only be established by a writing:

> "In the first place, it is extremely doubtful as to whether the allegations disclose an ordinary partnership, and clearly, in so far as the mineral lease or any other real property, are concerned, title thereto, under the laws of this state, could only be established by witten evidence. Article 2836 of the *Revised Civil Code of Louisiana*, declares:

"If any part of the stock of this partnership (an ordinary or particular partnership) consists of real estate, it (the contract of partnership) must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter prescribed with respect to partnership in commendam."

Since there was an allegation that appellants in the *Porter* case, *supra*, had contributed capital to the acquisition of certain real property the court reversed and allowed testimony on that score.

However, on the third appeal by appellants to the court they were again denied relief:

"What was found was that contrary to their allegations that they were partners with Cooke and Gay in an oil development adventure and had paid them monies to invest in it, plaintiffs were not associated with them as partners or joint adventurers, and had paid them no monies, and that Cooke and Gay sustained no relation to them whatever except that of trustee ex maleficio as to the leases and property Emlet, under duress as found by the court, had assigned to them that these leases and properties were worth far less than Cooke and Gay had laid out as consideration for them; and that from their exploitation and development, at Cooke's sole expense, they derived no profit but a heavy loss. That all the profits derived by Cooke and Gay were from properties which, no part of the Emlet leases, had been acquired and developed by them, wholly independent of Emlet. On these facts we think it plain that no other judgment could

possibly have been rendered on the merits than the one that was rendered."

Porter v. Cooke, supra, affirms the position of Respondent Morgan that partnership or a joint adventure in lands in Louisiana must be in writing.

Respondent Morgan sees no applicabilty to the situation found in *Thompson v. Walker*, 235 La. 132, 103 So.2d 65 (1958), found on pages 4 and 39 of the Petition to that here before the Court. There Thompson had record title and uninterrupted possession and though the bank purchased the property of Thompson at a tax sale in 1931, the amount paid by the bank had been charged against Thompson and recovered. Walker purchased the property from the bank in 1943 with full knowledge that the bank never exercised any of the incidents of ownership of the land.

Here, Respondent Morgan exercised all incidents of ownership and Petitioner Stricker none. Respondent Morgan was in full possession. Petitioner Stricker knew and understood at all times he had no interest in the land.

The cases cited in the footnotes by Petitioner Stricker on pages 45 and 46 of his Petition do not in anywise change the Louisiana rule requiring a writing. In fact, the cases there cited involving title to land were based on instruments of writing duly acknowledged and recorded. *Duncan v. Duncan*, 26 La. Ann. 532 (1874) and *Ceramic v. Hass*, 195 La. 1048, 197 So. 752 (1940).

Petitioner Stricker has no counter-letter as urged in his Petition on page 48. The case of *Louis v. Garrison*, 64 So.2d 254 (1953), there cited had a definite letter admitting a life estate in the parties, executed the same date as the deed, and further, actual delivery of the premises had been made to the life tenants.

Petitioner Stricker without a writing cannot escape the provisions of *Section 2275 of the Louisiana Civil Code*. Since there was no delivery, and in fact, uninterrupted possession by Respondent Morgan for a period of fifteen years, Petitioner Stricker could claim no title.

The case of *Morgan v. Hathaway*, 77 So.2d 169 (1955) found on page 51 of the Petition involved the question as to property purchased during marriage, being community property, and the court held that "this presumption can be rebutted only by strong and substantial evidence".

The strong and substantial evidence which the court in the *Morgan case, supra*, considered was a sworn affidavit filed for record in the parish where the land was situated.

The Court found:

> "Although there are several claims whereby each of the parties assert their rights in this matter, we believe that the important point for consideration is the fact that the defendant introduced into evidence an affidavit executed by all the petitioners wherein

the petitioners acknowledged that the property purchased by Mrs. Morgan on September 11, 1935, was the separate and paraphernal property of Mrs. Morgan, and further acknowledging her right to transfer the property, as per the act of sale of December 10, 1935, without the necessity of intervention of her husband, the petitioners' father. The petitioners further acknowledged in the said affidavit that they never did have and do not claim any interest whatsoever in said property as their mother had acquired the same with her separate and paraphernal funds and having disposed of same in a direct and legal manner.

"The record in this matter discloses that the verification of the petition was signed by petitioners' attorney, upon his information and belief. No witnesses, nor evidence, was introduced by petitioners to refute the affidavit which was filed by defendant. The affidavit was made by the petitioners on November 25, 1939 and duly filed for record in Conveyance Book No. 423, folio 309 of the Conveyance Records of the Parish of East Baton Rouge, the parish where the property is situated."

The authorities in Louisiana hold that a counter-letter must be of equal dignity to the act which it sets aside. In the case of *Succession of Curtis*, 100 So. 412 (1924), the court found:

"The rule is consecrated by law and jurisprudence, that, as between the parties to a written act, the only admissible evidence to prove simulation is a counter-letter, which is proof of equal dignity."

Respondent Morgan had sworn duly recorded deed to the land. Petitioner Stricker did not allege the existence of or introduce into evidence any writing that refuted such ownership.

An example of a counter-letter may be found in the case of *Duncan v. Duncan*, 26 La. Ann. 532 (1874) cited on page 45 of the Petition:

> "Know all men by these presents that I, Michael Duncan, of the city of New Orleans, hereby transfer to my sister, Mary Duncan, also living in the city of New Orleans, a certain frame house and lot with all its appurtenances, situated on Camp or Prytania Street, and known as the third house from Calliope street. Said house stands in my name but I have no interest in the same; it belongs to my said sister, Mary Duncan.
>
> 'M. Duncan.'
>
> 'Witness: Edward Duncan.'
>
> "The execution of this act was proved before a notary on June 18, 1870, and duly registered."

An example of a counter-letter may also be found in *29 Tulane Law Review*, 22 (1954):

> "Between the undersigned, A, living at .....
> ..... and B, living at .....
> .....
>
> "It having been noted that, by a act under private signature, recorded on ..... A has sold to B a house located at .....
> for the price of .....,

"This sale having solely the object of facilitating the carrying out of a certain enterprise by B, and being entirely fictitious, the parties hereby contract as follows:

"A and B recognize that the above sale is not real, and that B has not paid, nor A received in part or whole, the price recited as paid in the act of sale.

"The said sale must in consequence be considered as not having ever existed, and A has never been legally deseized of the ownership of the said house, whose rents he will continue to receive by the hands of B, until the moment when he will be put back in possession of the said house."

Petitioner Stricker had no such counter-letter nor is there any evidence in the record, and the Trial Court and Circuit Court so found, that Petitioner Stricker had any interest in the land and in fact, the record amply supports the Trial Court and the Circuit Court in their findings that Petitioner Stricker knew and understood at all times that he had no interest in the land.

The Court in *Glover v. Abney*, 106 So. 735 (1926) rejected as a counter-letter the following affirmation of Abney because no consideration was shown or received by Abney upon its execution:

"Know all men by these presents that, whereas I have purchased from Barcus Hubbard and Mary Glover two hundred and fifty-two (252) acres of land in Caddo parish, as per deed of this date passed before G. L. Jones, notary public in and for Harrison county, state of Texas, I hereby obligate and bind

myself and agree to sell said land back to the said Barcus Hubbard within 5 years from this date for the consideration of one thousand and seven hundred and fifty dollars, payable as follows: One-third cash, and the balance in not more than three notes of equal amounts, due one, two and three years after date, with interest at 8 per cent. per annum from date and retaining a vendor's lien and mortgage on the said land to secure the payment thereof. Said conveyance however, is to be without warranty express or implied."

Petitioner conveniently ignores the Louisiana law as to the necessity of a writing in partnership in land on pages 30-62 of his Petition. For instance, the cases of *Daspit v. Sinclair Refining Company*, 198 La. 9, 6 So.2d 341, and *Pillsbury Mills v. Chehardy*, 231 La. 111, 90 So.2d 797, cited by Petitioner on page 39 of the Petition do not in anyway concern itselves with title to land. The *Daspit case, supra*, involved the controversy by attorneys over the division of attorneys' fees and the *Pillsbury Mills case, supra*, facts had to do with a suit on open account for the proceeds due from the sales of eggs.

The Trial Court and the Circuit Court correctly applied the law.

CONCLUSION.

The Trial Court patiently and thoroughly listened to and observed all of the testimony, personally and exhaustively examined all of the correspondence, documents,

books and records, heard lengthy oral arguments, considered and studied voluminous briefs, and after mature deliberation fairly and justly decided all issues of fact and law against the Petitioner. The record substantiates his findings and conclusions. The Circuit Court in like manner reviewed the record, examined the documents, correspondence and books and records, and further heard the oral argument of counsel and considered and studied voluminous briefs, and affirmed the findings of the Trial Court in all particulars. The findings and conclusions of the Trial Court and the Circuit Court should remain undisturbed. The Petition for Certiorari should be in all things denied, and it is respectfully so prayed.

Respectfully submitted,

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CERTIFICATE.

I, the undersigned, W. H. Talbot, do hereby certify that I have on this date transmitted a copy of the above and foregoing Brief of Respondent, J. P. Morgan, et al., to each of the attorneys of record for the Petitioner, R. M. Stricker, addressed to them at the respective post office addresses as shown of record herein, namely, Messrs. E. Leland Richardson, Gerald N. Sims, John Dale, Jr. of Dale, Richardson and Dale, Baton Rouge and Vidalia, Louisiana, Gerard Brandon of Brandon, Brandon, Hornsby & Handy, Natchez, Mississippi, and Clay B. Tucker, Woodville, Mississippi.

This the .... day of January, 1960.

W. H. TALBOT,
Of Counsel for Respondent,
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FILE COPY

FILED
FEB 6 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased),

Respondents.

BRIEF ON BEHALF OF PETITIONER IN RESPONSE TO BRIEF OF RESPONDENTS OPPOSING PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

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R. M. STRICKER,

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REPLY BRIEF.

Reply to Respondents' Opening Statement.

Nothing could be further from the truth than the opening statement of Respondents in their opposition to the

Petition for Writ of Certiorari. This is not a case of someone trying to assert a claim to land after oil production has been obtained. Stricker has always asserted his claim to the land, including timber, oil and all mineral rights concomitant with an ownership of an undivided one-half interest thereon or a right to be vested with an undivided one-half interest as an incident to an accounting and division of profits. The contrary of that stated by the Respondents is true, for, whereas the documentary evidence clearly shows that Morgan initially recognized Stricker's rights, it was only when the value of the land for oil and mineral production became apparent that Morgan proceeded in a manner designed to defraud Stricker of his rights.

The Respondents have tried to put the shoe on the wrong foot. Contrary to that stated by Respondents, the outstanding and recognized fact is that of the total of eleven purchases of land and, in some instances, of timber without acquiring the fee to the lands both in Mississippi and in Louisiana, the Esperanza purchase transaction is the only one in which Stricker was not accorded by Morgan a just and equitable share with Morgan in all profits and it is to be noted that the Esperanza purchase was the *only one from which oil has been produced.*

There was not fifteen years delay; for Stricker had no right to demand an accounting or conveyance to him until in the year 1947. The actions of Morgan to implement his design to defraud Stricker is established by the testimony of handwriting expert George Lacey tes-

tifying with reference to alterations made on Morgan's ledgers[1] (Plaintiff's Exhibit 47 and with particular regard to Ledger Sheet 74, a part of Plaintiff's Exhibits 47 and 48), the making and opening of new and different ledger sheets and the changes in accounting procedure as evidenced by the statement of Louisiana Box & Lumber Company dated December 31, 1943.

Respondents say that Petitioner has ignored the entirety of the evidence in the statement of facts contained in his Petition for Writ of Certiorari and refers to the findings of fact and other factual statements contained in the opinions of the trial judge and of the Court of Appeals. It is the court findings of fact which the Petitioner declares is contrary to undisputed documentary evidence and totally unsupported by any evidence, as the Court will readily perceive when it reviews this record.

There is no evidence in this record that by virtue of the deed from Campbell into the name of Morgan, Stricker acquired a right to anything less than a full one-half interest in the Esperanza Plantation, in its entirety, in equity.

It is judicially admitted of record by Respondents that upon and by virtue of the acquisition of Esperanza Plantation by the deed from Campbell (conveyance of it into Morgan by name), Stricker acquired some interest in that property, an "immovable", and that such was by virtue of the agreement between Stricker and

[1] R. Vol. 6; pages 1038-1051 and exhibits therein referred to

Morgan pursuant to which that property, in its entirety, was purchased, in fee.[1a]

Respondents say that the agreement by and between Stricker and Morgan, pursuant to which the Esperanza Plantation was purchased, was that Morgan was to own the land and that Morgan and Stricker, together, were to own the timber standing on the land. But there *is no evidence in this record of any such limiting or modifying agreement.*

By their aforesaid Judicial Admissions of Record, Respondents admit that there is and was no impediment under Louisiana law that prevented Stricker from acquiring, *ab initio*, an interest (enforcement by recourse to equity) in the standing timber (an immovable) on Esperanza Plantation. Ergo, it follows, there could have been none to prevent Stricker from acquiring, *ab initio*, a like equitable interest in and to the entirety of said Plantation.

Evidence in this record that *ab initio* Stricker became entitled to *some* interest in Esperanza Plantation (an immovable) includes:

(1) The evidence of their original profit and loss sharing agreement.

(2) Their course of dealings with each other over the years.

[1a] R. Vol. 4, pp. 693-694

(3) That Stricker discovered the timber for sale, had it cruised and made the purchase offer for benefits of Stricker and Morgan in 1940.

(4) Stricker participated in negotiations for the purchase of the property in Morgan's name in 1940.

(5) Stricker negotiated for sale of some of the timber in 1947 by procuring competitive bids.

(6) Morgan's Louisiana Box & Lumber Company made a competitive bid to Stricker and Morgan for the timber in 1947.

(7) Stricker negotiated the timber sale to the successful bidder, General Box Company, in 1947.

(8) Stricker and Morgan divided equally the profits attributable to the 1947 timber sale.

(9) The judicial admissions of record hereinabove referred to. (Stricker's rights were not created by such admissions. They existed, *ab initio*, from the date of original purchase of the Plantation from Campbell.)[1]

(10) Other matters in this record hereinafter referred to.

Evidence in this record that *ab initio* Stricker became entitled to a full and equal share or interest with

[1] For supporting documentary evidence see Appendix 2504-B and Appendix VII to Petition for Writ.

Morgan in Esperanza Plantation, in the entirety, includes:

(1) All of the matters immediately above referred to; and:-

(2) At time of purchase in 1940 it developed that the timber could not be acquired from Campbell, or otherwise, separately from the land in its entirety.

(3) In accord with their custom in other instances, the land in its entirety was purchased in the name of Morgan.

(4) The amount paid was increased, of necessity, but all checks issued for the purchase bore the same endorsement of the purpose for which each was issued.

(5) Thereafter this purchase transaction and the property in its entirety was handled by the parties just as had been handled all others of their purchases made pursuant to their original profit and loss sharing agreement.

(6) Stricker negotiated the oil leasing and exercised general supervision over the property.

(7) Many other matters of record herein mentioned and referred to.

For supporting documentary evidence see Appendix 2504-B and Appendix VII to Petition for Writ.

The only evidence to rebut the conclusion that *ab initio* Stricker became entitled to a full and equal share or interest with Morgan in the property, in its entirety, is: That thereafter Morgan sought to dispute Stricker's claim and sought by devious means to avoid his obligation to accord to Stricker a full and equal participating share therein.

Stricker's rights having become vested *ab initio*, same could not be avoided by subsequent disputations.

Reply to that said by Respondents Relative to Judicial Proceedings.

We are cognizant of the rule that an appellate court will not disturb the findings of fact of a trial court or an intermediate appellate court where same is found to be supported by any competible evidence unless contrary to the great weight of the evidence or unless such findings are not supported by any evidence. But, we invoke with equal emphasis the rule that where there is no factual dispute shown by the record and where the evidence is documentary, not dependent upon the advantage of the trial court by its own opportunity in the trial court to observe the demeanor of witnesses, that appellate courts are free to review the facts and independent adjudication thereon.

Petitioner declares that the lower courts' fact findings are (1) contrary to the undisputed evidence in this case, (2) were induced by an erroneous view of the applicable law, and (3) that the essential evidence in-

this case is *wholly documentary* and that such oral evidence as there is in this record was by witnesses whose testimony was explanatory and interpretive of the documentary evidence offered by the parties.

Hence the rule invoked by Respondents seeking to prevent this Court from reviewing this record because of the lower courts' fact findings is not applicable.[2]

As the court stated in *American Propeller & Manufacturing Co. v. United States* (*Supra*, footnote 2):

> "—the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Contrary to the findings of fact, we submit the following:

There was from the beginning a "partnership" agreement between Stricker and Morgan.[3]

Stricker knew and understood at all times that he was entitled to become vested with an interest in the land when all costs had been recovered by Morgan.[4]

There was an agreement between Stricker and Morgan concerning the original acquisition and subsequent operation of Esperanza Plantation, and such agreement was

[2] 3 Am. Jur. Verbo "Appeal & Error", Sec. 899, pp. 463-464, and case cited in footnote: American Propeller & Manufacturing Co. v. United States, 300 U. S. 475; 81 L. Ed. 751 (1937).

[3] Appendix 2504B, p. 3.

[4] Appendix 2504B, p. 63.

evidenced and did arise from the course of dealings between the parties,[1] and as evidenced by their correspondence pertaining thereto.

Stricker at all times claimed and understood that he had an interest in and was entitled to become vested with an interest in Esperanza Plantation beyond (and hence including) an interest in and a right to participation in the profits from the timber.[2]

The only instance shown by this record where Stricker received a commission or bonus from others pertaining to properties in which both Stricker and Morgan were interested was the instance where Stricker in association with Dale was assembling a large block of lands for mineral leasing, which block included a tract in which Stricker and Morgan were both interested. Stricker shared commissions for assembling this block for an oil company with Dale but procured for himself and Morgan a better consideration for their lease than was paid to other property owners in the block. Stricker's action in this respect was in no way antagonistic or disadvantageous to Morgan and indeed Stricker was acting in the best interest of Morgan.

Witness Morgan's bookkeeper Owen was led to say that certain payments made by Louisiana Box & Lumber Company to Stricker were commissions, but all were shown to have been sums accruing to Stricker for purchases of logs from properties of others (in which

[1] Plaintiff Exhibits "6" (Apx. 2 Vol. 204 B p. 37) [illegible]
[2] Appendix 250 B. p. 62

neither Stricker nor Morgan were interested owners) except payments that were shown to have been made to Stricker to refund to him for expenditures for log rafting costs in getting out timber.[7]

In all of the many transactions entered into between Stricker and Morgan they always shared on an equal basis both as to profits and losses.[8] In not one instance has it been shown by any documentary evidence or testimony in this cause that Stricker conducted himself as a broker or middleman and accepted a commission or bonus from others.[9]

Inasmuch as Stricker always kept his books on a "cash basis" for income tax purposes, it was not necessary that he either treat within his books and records or upon his income tax returns income received from the various transactions had between him and Morgan as partnership income.[10] There is nothing in the record which would show that Stricker and Morgan conducted their relationship between each other other than as they designated it as a "partnership".[10] Each transaction

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[7] Record Vol. 7, p. 1243; 1302-1310; Record Vol. 7, pp. 1310-1329; Record Vol. 8, pp. 1705-1566 (Walgin Grove); R. Vol. 8, pp. 1579-1587, R. Vol. 9, pp. 1628-1639 (McKellar Timber); R. Vol. 9, pp. 1630-1611 (Hamlet's); R. Vol. 9, pp. 1611-1652 (Kentzer Cured Timber); R. Vol. 9, pp. 1652-1671 (Antonish); R. Vol. 9, pp. 167[illegible]-1675 (Stockert's); R. Vol. 9, pp. 16[illegible]-1[illegible] (Point Breeze timber); R. Vol. 7, pp. 1211-1216, 1311 and Pl. Ex. 90, R. Vol. 9, pp. 1786 (Cole's Creek); R. Vol. 9, pp. 1761-1775 (Woodlawn); R. Vol. 9, pp. 1779-1781 (Mockie timber).

[8] Record Vol. 12, pp. 2203-2213.

[9] Appendix 2501B, p. 37; Pl. Ex. 75 sheet 2; Pl. Ex. 133, sheet 2; Pl. Ex. 113, sheets 15, 16, 35, 36; Pl. Ex. 122, sheets 9, 11; Pl. Ex. 106, sheets 1 & 2; Appendix 2501B, p. 35; Appendix VII, p. 57; Pl. Ex. 152, sheet 19; Pl. Ex. 107, sheet 1; Pl. Ex. 111, sheets 19-20, 30-31; Pl. Ex. 113, sheets 15-16, 35-36.

was entered into between Stricker and Morgan based on their original agreement on a profit and loss sharing basis.[11]

There was no occasion for Stricker to make reference to Esperanza Plantation in his 1948 letter to the Internal Revenue Service, since that related solely to cash income by him received from oil, gas and mineral leases. Similarly, there being no occasion to do so, Stricker did not include reference to any other tract of land in which he owned minerals but from which for the related period he had received no cash income.[12]

The record title to Esperanza Plantation was vested in Morgan in accordance with the long standing agreement between the parties as to the other properties, until Morgan had been reimbursed the costs of acquisition. At no time prior to the institution of this suit was any possession or dominion of the property exercised by Morgan exclusive of Stricker's rights. At all times from date of purchase Stricker managed the property, negotiated the mineral lease, negotiated the sale of timber, had the property lines surveyed and paid one-half of the cost, and exercised general management and supervision, negotiated grants of pipe line rights-of-way and for surface damage done to the property, and by Morgan was brought into negotiations for granting of sites for the drilling of wells to be bottomed under adjoining properties. Physical possession of the

[11] Appendix 2501B, pp. 1-3.
[12] Footnote 9, supra.

property at all times was had through the activities of Stricker.[13]

Stricker by documentary evidence and testimony of witnesses interpretative and explanatory of documentary evidence established his right to the relief he sought in this suit, which evidence in this record is not contradicted.

The only inferences which can be drawn from the evidence in this record are those which are in accord with the facts alleged in the original complaint.

No record references were made by the District Court or by the Circuit Court of Appeals in their respective opinions, nor by Respondents in their brief to support any of the lower courts' findings of fact.

The lower courts' fact findings appear to have been induced by the erroneous conclusion of law that it was necessary for Stricker to prove the existence of a *"general partnership agreement"* between him and Morgan. No such "general partnership" encompassing all business activities of the respective parties was alleged nor was any such essential to Stricker's right to an ac-

[13] Pl. Ex. 98, sheets 1-7, Appendix 2504B, pp. 50-58; Pl. Ex. 97, Appendix 2504B, p. 60-61, Pl. Ex. 101, Appendix 2504B, p. 62; Appendix 2504B, p. 63, Pl. Ex. 115, sheet 5; Appendix 2504B, p. 65-72; Pl. Ex. 116, sheet 1, 3, 6, 7; Appendix 2504B, p. 72, Pl. Ex. 117, sheet 3; Appendix 2504B, p. 75-78, Pl. Ex. 119, sheets 1, 4-6; Appendix 2504B, p. 80, Pl. Ex. 120, sheet 1; Appendix 2504B, p. 106-110, Pl. Ex. 132, sheet 1-5; Appendix 2504B, p. 112-116, Pl. Ex. 133, sheet 1-6; Appendix 2504B, p. 111, Pl. Ex. 183; Appendix 2504B, p. 73, Pl. Ex. 118.

counting and division of profits under the contracts and agreements shown to have existed between them and under their relationship to one another and all of their transactions, including that specifically applicable to Esperanza Plantation.

Petitioner's Reply to Respondents' Contention that the Louisiana Law is Solely Applicable to this Case.

Petitioner does not quarrel with the general principle that instruments *affecting the title* to real estate must be governed by the laws of the state in which it is situate. But the Respondents seek to have this Court overlook the fact that this action is one primarily for an accounting, division of profits, and to require that Petitioner be vested with an interest in the realty in furtherance of the division of profits, under all of the equities invoked by the original agreement pursuant to which all of the transactions between the parties were entered into,[14] and pursuant to which Esperanza was purchased, managed and handled. The course of dealings between the parties extending over a period of many years and the writings and the writings which are exhibits in this record evidence the rights and obligations of the partes inter se.

Respondents would have this Court ignore the fact that throughout the entire course of their dealings with one another, including that pertaining to the management and control of Esperanza Plantation, negotiations for mineral lease thereon, the division of profits ac-

[14] Appendix 2504B, p. 3.

crued from so much of the timber as was sold therefrom, they did contract and act in accordance with the principles of common law jurisprudence of the State of Mississippi with reference to which the initial contract was made and that whether the property (in every instance realty) was situate in Mississippi or Louisiana.

We are not here speaking of the law applicable to that instrument whereby Esperanza Plantation was conveyed by the former owner Campbell to Morgan. Louisiana law must apply to that instrument. We are speaking of the contractual and equitable rights and obligations between Strickey and Morgan arising out of the purchase; and it becomes immaterial whether the final necessitous decision to purchase the land as well as the timber had its final consummation in Mississippi or Louisiana since the laws of both states recognize and apply equitable principles.

The original profit and loss sharing agreement entered into between the parties had its inception in the acquisition of realty situate in Mississippi and the evidence is conclusive that the parties contracted with reference to common law and equtable jurisprudence and thereafter in all of their transactions continued to contract and deal with each other similarly. These principles of law governed the parties whether the relationship was that of partnership or of joint adventurers or whether under common law and equitable jurisprudence or the Louisiana Civil Code (Louisiana Civil Code. Article 21) Morgan is to be treated as holding title in trust and thereby compelled to do equity

upon an accounting for profits. That relationship existing between the parties and under which this Petitioner is entitled to relief in every instance in this record is evidenced by writings and in no respect whatsoever does same depend upon proof by parol.

Throughout their writings these parties denominated their relationship as being one of *partnership*. In their purchases and sales of land or timber from lands and in farming operations and in cattle operations and in all respects they shared profits and losses equally and dealt with each other as partners. The Mississippi courts have given revealing effect to the intent of the parties to a contract in determining what law is to govern the mutual rights and liabilities of partners, of joint adventurers and of those cast in the position of trustee to enforce equities.

In this discussion we shall show that those decisions are not out of harmony with the decisions of the Supreme Court of the State of Louisiana.

The prevailing general rule is that "the law of the place where a partnership is entered into generally governs the mutual rights and liabilities of the partners".[15]

[15] In the above mentioned text the Louisiana case of *Baldwin v. Gray*, 4 Mart. N.S. (La.), 192 Am. Dec. 169 is cited.

"The obligation of partners and of a principal and his agent as between themselves are determined

Conflict of Laws, 11 Am. Jur., Sec. 28

by law of the place where the agreement of partnership or agency was made"[16]

In the comment under the above statement it is said

"Although a partnership is created by a contract between the parties, the relationship of principal and agent is not necessarily so created. Both the relationship of partnership and that of principal and agent, however, are made by an agreement between the parties. Such an agreement involves a manifestation of willingness to enter the relationship by one party and an acceptance thereof by the other. If the relationship is created by an agreement which is binding as a contract, the obligations of the parties as between themselves are governed by the laws of the place of contracting. If the agreement does not constitute a contract, the obligations of the parties as between themselves are governed by the laws of the place of agreement."

"It seems, and most of the critics are agreed, that matters of validity which go to the very basis of the making of a contract involve primarily the law of the place where the contract is made—

"The trend—among the authorities and treatises—seems to be toward accepting the law of the places of making as governing the validity and construction of a contract. In the interest of practicality and uniformity some one rule should be recommended. This rule seems to be the most logical"[17]

The Supreme Court of Mississippi, whereas it recognizes the force of the above statement, yet adheres to

[16] Am. Law Inst. Restatement, Conflict of Laws, Sec. 342
[17] Conflict of Laws, Am. Jur., Sec. 116

the "rule of intent of the parties" as controlling over the *lex loci* contractus. Such is the holding of the Supreme Court of Mississippi in the case of *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, 71 A.L.R. 741, wherein it was said:

> "It may be that the rule which applies the lex loci contractus to the validity of contracts made in one state to be performed in another is the more logical, and it would seem that the law either of the place of making, or of performance, should apply absolutely, without reference to the intention of the parties; but *the intention rule* is too firmly fixed in the judicial history of this state to be now changed by judicial action." (Emphasis supplied.)

Further referring to the treatise on this subject in American Jurisprudence[1] we find this statement:

> "It is a familiar rule that the construction and validity of a contract are governed by the law of the place where it is made."

Numerous Louisiana and Mississippi decisions are cited in support of the above statement as well as many decisions of the United States Supreme Court and other federal cases as well as decisions from most of the other states of the Union.

> "The foregoing rule is based on sound reason as well as authority. While persons have their places of domicile and property has its situs, it is clear that apart from the law itself in contemplation of which either expressly or impliedly a contract is made, there is nothing of a discernible nature and

[1] Conflict of Laws, 11 Am. Jur., Sec. 117.

can serve to aid the courts in determining the complicated questions of conflict that continually arise. There is obviously no difficulty where the domicile of the parties, the situs of the property involved, and the place of execution and performance of the contract are all in one jurisdiction. It is only when the law relating to any one or more of the essential incidents of a contract—domicile of the parties, situs of property or jurisdiction of matters involved, place of execution, and place of performance—is different from the law that obtains as to some or all of its remaining incidents that questions arise. *Accordingly, a contract valid where made is, as a rule, valid everywhere; and a* contract invalid where made is invalid everywhere.'" (Emphasis supplied.)

"The validity or invalidity so determined will generally be recognized wherever it is sought to be enforced, even though the law of the forum would have determined otherwise if applied."[28]

The Louisiana case of *Saul v. His Creditors*, 5 Mart. N.S. (La.) 569, 16 Am. Dec. 212, is cited in support of the above statement, as are numerous other cases from other jurisdictions.

We have already referred to the fact that the courts of the State of Mississippi have given greater effect to the intent of the parties in determining the applicable law with reference to which the parties have contracted

[28] Conflict of Laws, Am. Jur., Sec. 117; *Ivey v. Lalland*, 42 Miss. 141, 97 Am. Dec. 475, 2 Am. Rep. 606; *Galliano v. Pierre*, 15 La. Ann. 10, 89 Am. Dec. 643; *Puckner v. Watt* 19 La. 216, 36 Am. Dec. 671; and numerous other decisions cited.

[29] Conflict of Laws, 11 Am. Jur. Sec. 117.

and which is to govern their rights and liabilities to each other.

For a discussion of this rule we refer the Court to Conflict of Laws, 11 American Jurisprudence, Section 119, and quote certain excerpts therefrom:

> "Under one theory the conflict between the various rules and theories that have been stated is more apparent than real, since the majority of them, perhaps, may be reconciled by the application of another rule, namely, *that the true test for determination of the proper law of a contract is the intent of the parties and that this intent, whether expressed or implied, will always be given effect* except under exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law."[21] (Emphasis supplied.)

The foregoing statement in the text is supported by citation of innumerable authorities, including a number of decisions by the Supreme Court of Mississippi.[22]

Under the aforesaid text there is also cited the Louisiana case of *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281.

> "Under this theory the rules governing this subject may be considered as merely guiding principles for the determination of the intent of the parties. It is generally agreed that the law of the place where the contract is made is prima facie that

[21] Conflict of Laws, 11 Am. Jur., Sec. 119.

[22] *Castleman v. Canal Bank & Trust Co.*, 171 Miss. 291, 156 So. 618; *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, 71 A.L.R. 741; *Shannon v. Georgia State Building & Loan Assn.*, 78 Miss. 955, 30 So. 51, 57 L.R.A. 800, 84 Am. St. Rep. 657.

which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail, in the absence of circumstances indicating a different intention.—

"The parties may, under this principle, readily adopt any law as that of the contract; and if the adoption is bona fide and devoid of fraud, the entire transaction will be governed by such law in accordance with the intent of the parties, regardless of where the contract is actually made.

"It is a rule that if the place of performance is different from the place where the contract is made, *the* presumption is that the former is intended to apply."[23] (Emphasis supplied.)

The Petitioner has at no time in this case tried to prove title to realty by parol, for all of the proof in this case is by documentary evidence and by witnesses whose testimony was interpretative and explanatory of the documentary evidence. There having been a profit made above losses and the land remaining representing all profits that have not heretofore been divided, Stricker is entitled now to be vested with title, his right to be so vested is evidenced in this case not by parol but by documentary evidence.

[23] Conflict of Laws, 11 Am. Jur., Sec. 119.

Petitioner's Reply to Respondents' Proposition that "There Must be a Writing" and that "There Could Have Been no Partnership or Joint Adventure in the Esperanza Lands in Louisiana" without there having been Between the Parties Written Articles of Agreement made by Authentic Act.

Respondents devote a considerable portion of their brief in support of the proposition that in Louisiana title to realty cannot be established by parol evidence. As stated in the Petition filed herein, Petitioner throughout this litigation has never attempted to prove his right of recovery as prayed for by parol evidence. In briefs and upon oral argument in both lower courts, Petitioner has emphatically urged that his claim asserted in this proceeding is not based on parol evidence but is based entirely on written instruments, letters, documents, accounts and other writings. Notwithstanding this strenuous effort on the part of Petitioner to convince both lower courts that Petitioner was relying solely on those *writings*, the courts in each instance have based their opinions on the principle of law that title to real in Louisiana cannot be established by parol evidence. The lower courts have completely disregarded the well established jurisprudence of Louisiana construing and interpreting Articles 21, 2292, 2293 and 2294 of the Louisiana Civil Code and the decisions of the Louisiana Supreme Court construing and interpreting these articles, all as is completely set forth in the Petition for Writ of Certiorari filed herein at pages 30 to 44. Therefore, it is clear that both courts below have so far departed from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision.

Respondents in their brief opposing the Petition for Writ of Certiorari have referred to the decision of the Louisiana Supreme Court in the case of *Stack v. DeSoto Properties*, 221 La. 384, 59 So. (2d) 428 (1952), by saying that the Louisiana Supreme Court refused to substitute the letter involved in that case for the requirement that all transfers of property in Louisiana must be in writing. It would appear from their statement that they have not read this decision, as the court did not refuse to substitute the letter involved in that case for the requirement that all transfers of property in Louisiana must be in writing. To the contrary, the Louisiana Supreme Court said:

> * * * Recognition of plaintiff's right to an interest in the property is plainly provided to be contingent upon a recoupment of the advances by the syndicate members prior to the due date of the last maturing purchase payment note."

As stated by the Louisiana Supreme Court in that case, plaintiff's petition did not allege nor was it shown by the evidence that the condition in the letter upon which plaintiff was to receive an interest in the property was met.

Respondents also refer to the case of *Sparrow v. Sparrow*.[1] Their brief states that the courts in Louisiana

[1] Sparrow v. Sparrow, 231 La. 966, 93 So.2d 232 (1957).

fail to recognize the principle of law established in the decisions of the Louisiana Supreme Court in the cases of *Viens v. Brickle*, 8 Mart. (O.S.) 11 (1820); *Delamour v. Roger*, 7 La. Ann. 152 (1852), *Malady v. Malady*, 25 La. Ann. 448. This statement is wholly inaccurate. In that case the Supreme Court of Louisiana held that the contributions toward the acquisition of realty were made after the relationship of concubinage began, so plaintiff could recover no interest in the realty for the reason that the motive for the relationship of the parties was concubinage and violated Article 2804 of the Louisiana Civil Code which states that:

> "All partnerships are null and void which are formed for any purpose forbidden by law or good morals. * * *."

Notwithstanding the fact that the majority of the court denied plaintiff's right to recover because the relationship violated said article of the Louisiana Civil Code; yet one member of the court dissented and gave reasons therefor as follows:

> "Undoubtedly, the contributions made by plaintiff toward the accumulation of the assets in question were rendered in business transactions and enterprises independent of the concubinage relationship. This being true I am of the opinion that she is entitled to a one-half interest in the property acquired in decedent's name. Delamour v. Roger, 7 La. Ann. 152; Malady v. Malady, 25 La. Ann. 448; Prieto v. Succession of Prieto, 165 La. 710, 115 So. 911; Heatwole v. Stansbury, 212 La. 685, 33 So. 2d 196, annotation at page 1297 of 31 A.L.R. 2d."

We submit, therefore, the statement made by Respondent's concerning this decision at page 34 of their brief is entirely erroneous and, as a matter of fact, the decision strengthens the previous decisions referred to in the Petition for Writ of Certiorari, pages 30 to 37.

It is true that the courts of Louisiana have held that the relationship of joint adventurers is governed by the principles which constitute and control the law of partnership. This is true under common law and equitable jurisprudence in the common law states as it is in Louisiana; but here we take issue with counsel for Respondents, viz.: At no time has the Supreme Court of Louisiana stated that the relationship of joint adventurers can be established only by a contract in writing by authenticated act under private signature, for the contrary has been said by Louisiana.

As stated (25 Tulane Law Review, 332, 334), the Louisiana courts have "unhesitatingly adopted the common law joint venture concept".

It is true that in Louisiana, as in the common law states, the relationship of joint adventurers can arise only by contract, but in two leading decisions of the Supreme Court of Louisiana it has been said: That relationship shall rest "upon a contract *either* express or implied".[25]

[25] *Dysart v. Sinclair Refining Co.*, 198 La. 9, 6 So.(2d) 341, 345; and *Pillsbury Mill v. Richards*, 131 La. 111, 90 So.(2d) 797, 801.

We find it impossible to imagine an implied contract in writing by authenticated act, for such a contract would be an expressed contract.

Therefore, it is not the jurisprudence of Louisiana or of Mississippi that the contract entitling Stricker to relief as prayed for in his original bill must have been evidenced by formal articles of agreement in writing.

Petitioner's Reply to Respondents' Contention that Stricker is Barred by Prescription and Laches.

Respondents have erroneously contended that Stricker's rights are barred by prescription and laches on the assumption that Stricker's right of action accrued on December 30, 1946 when the Esperanza Plantation was purchased and that he did not thereafter file his suit until October 1955. The predicate upon which Respondents base their argument is false and erroneous in that Stricker had no right to demand any share or interest in the profits of this purchase or in and to the corpus thereof until the property had finally paid for itself as to purchase price and all other items of cost after and by virtue of the sale of some of the timber therefrom on February 10, 1947, to General Box Company. Until this sale in 1947 sufficient proceeds had not been received from the property to cover the initial consideration paid for the property of $26,500.00 and the additional costs and expenses that had been advanced and charged to cost of it by Morgan. It was not until 1947 when the Esperanza timber was sold to General Box Company that the property paid for itself and not

until then was there any profit or division. Hence not until after February 10, 1957 could Stricker have maintained any action for a share in the property itself as profits derived from the purchase. In numerous other instances the parties Stricker and Morgan had continued to leave the status of the title in quo, i.e., vested in Morgan, long after the properties had paid themselves out, thus continuing to manage and operate the properties for the mutual and joint benefits of themselves jointly under their existing agreement; and hence there was no cause, reason or occasion for Stricker to immediately demand conveyance to him or final accounting from Morgan.

Although at one time shortly prior to the sale of the timber to General Box Company Morgan had indicated to Stricker in a conversation that he could not accord to Stricker an interest in the land after all the timber had been cut therefrom, stating as his reason therefor the fact that he and Stricker had verbally agreed with Jake Laub and Bob Graham that after Morgan and Stricker had cut all the timber from Esperanza Laub and Graham would be given an opportunity to purchase the plantation (on which agreement, unbeknownst to Stricker, Morgan had already reneged, as evidenced by Morgan's correspondence with Barchus),[26] yet when by letter Stricker recited and insisted upon the term of the agreement under which Esperanza Plantation had been bought,[27] Morgan withdrew from any positive position if there had been any positive position that

[26] Pl. Ex. 94, p. 2, original sent up.
[27] Pl. Ex. 115, pp. 5-7, original sent up.

Stricker was not entitled fully and equally to the benefits of this purchase by inviting Stricker to discuss the matter with Morgan further.[28]

Never thereafter prior to the institution of this suit did Morgan expressly deny that which is claimed by Stricker in this suit; Stricker and Morgan continued to look after the property; Stricker devoted time in a managerial capacity, seeing to surveys thereof, and etc.; and Stricker likewise continued his efforts after the sale of timber to General Box to dispose of the remaining merchantable timber thereon, and indeed Morgan recognized Stricker's continuing interest and rights in the Esperanza property.[29]

So, with respect to Respondents' contentions regarding laches and prescription, we say that Respondents' position is untenable for the following reasons:

(1) No statute of prescription had run.

(2) Never until shortly before institution of this suit was Stricker apprised that Morgan had

[28] Pl. Ex. 115, pp. 8-9, original sent up.

[29] Pl. Ex. 115, p. 5;
Pl. Ex. 116, pp. 1, 3, 6, 7;
Pl. Ex. 117, p. 3;
Pl. Ex. 119, pp. 1, 4-6;
Pl. Ex. 120, p. 1;
Pl. Ex. 132, pp. 1-5;
Pl. Ex. 133, pp. 1, 3-8;
Pl. Ex. 156;
Pl. Ex. 183;
Pl. Ex. 183;
Pl. Ex. 118, R. Vol. 8, p. 1151;
Pl. Ex. 214, R. Vol. 12, p. 2230;
Pl. Ex. 25, R. Vol. 2, p. 240, R. Vol. 3, p. 473;
Pl. Ex. 27, R. Vol. 2, p. 327, R. Vol. 3, p. 474;
Pl. Ex. 158, pp. 2, 4, 6, 8, 10, 15.

dealt adversely to the interest of Stricker by making certain deeds of gift and donations of royalties to members of his family.

(3) Never until the institution of this suit did Morgan affirmatively and conclusively deny Stricker's claim; but, rather, Morgan led Stricker on by inferring that Stricker would eventually receive his one-half interest in the Esperanza Plantation.

(4) To the time of the institution of this suit Morgan had suffered no good faith change in position, but, rather, had only gratuitously conveyed interests in royalties or minerals to members of his immediate family.

(5) Whereas it is true that by the time this case finally came on for trial on the merits Morgan had been adjudged an interdict, yet when the suit was filed Morgan was of sound mind, was in good health and did not become ill until more than two months after this suit was filed (a circumstance which could not have been foreseen by Stricker), and suffered no mental impairment until many months thereafter. The only possible witnesses lost to Morgan or to Stricker were, by the death of Jake Laub (June 30, 1949) and Charles Barchus (November 2, 1942), who might have testified as to the conversation that occurred between Stricker and Morgan in John Dale's office when Laub and Graham withdrew as purchasers of Esperanza. There is nothing in this record to indicate that Laub or Barchus would have testified favorably to Morgan. The contrary is indicated.

The Louisiana courts have consistently held that mere silence and delay could not cause a loss of title to property except by the effect of the laws or prescription.

Long v. Chailan, 187 La. 528, 175 So. 49; Dugas v. Powell, 207 La. 316, 21 So. (2d) 366, 373.

It is established that under the jurisprudence of the State of Louisiana, as is true under the jurisprudence of Mississippi, co-owners cannot prescribe against each other.

Williams v. Harrell, (1913), 132 La. 1, 60 So. 699; Bornio v. Berger, (1925), 1 La. App. 482, judgment affirmed, 158 La. 915, 105 So. 11

The *Bornio* case (*supra*) is particularly important since there the title had been taken for convenience in the name of St. Amand of whom the defendants were heirs, but St. Amand had given plaintiffs an unrecorded counter-letter. The defendants pleaded the ten-year and thirty-year codal provisions of prescription, which were held by the court to be without foundation or fact and hence inapplicable since the defendant or his heirs had never possessed to the exclusion of the plaintiffs. *Morgan has never here possessed to the exclusion of Stricker.*

Thus we submit that inasmuch as under no circumstances could Stricker have brought this suit until after February 10, 1947, the ten-year statutes of prescription of Louisiana cited by Respondents have no application to this case.

This action was brought well within any prescriptive period of time applicable to the Petitioner's cause of action.

Aside from the bar of a statute of limitations, "laches" in a legal sense is not merely delay but delay that results in injustice or disadvantage to another who himself is in good faith, and time is only one element. There must be some element of estoppel or change in condition or relation of parties or intervention of rights of third persons who are themselves innocent and in good faith so that it would be inequitable to permit the party to then assert his rights.[28]

The application of the doctrine of laches is controlled by equitable considerations. *It cannot be invoked to defeat* justice, and will be applied only where enforcement of the rights asserted would work injustice.[29]

A plea of laches is not favored predicated upon an alleged delay short of the statutory period of limitation or prescription.[30]

[28] Sample v. Romine, 193 Miss. 706, 8 So.(2d) 257, suggestion of error overruled, 9 So. (2d) 643, judgment corrected 10 So. (2d) 316. See also Mobile & Ohio R. Co. v. Swain, 162 Miss. 825, 115 So. 627; Brown v. Alexander, 118 Miss. 548, 79 So. 452; Labarre v. Rateau, 210 La. 31, 26 So. (2d) 279.

Labarre v. Rateau, supra.

[29] Pons v. Yazoo & Mississippi Valley R. Co., 131 La. 313, 59 So. 721, appeal dismissed (1914), 232 U. S. 720, 34 Sup. Ct. 602, 58 L. Ed. 814; Smith v. Smith, 211 Miss. 481, 52 So. (2d) 1; Waldrop v. Whittington, 213 Miss. 567, 57 So. (2d) 238, Dampier v. Polk, 214 Miss. 65, 58 So. (2d) 44; Gault v. Brannon, 222 Miss. 111, 75 So. (2d) 439, White v. Merchants & Planters Bank (Miss.), 90 So. (2d) 11.

Counsel for Respondents cite in their brief the case of "*Comans v. Tapley*, 57 So. 567 (1912)", omitting to mention that that was not a decision by the Supreme Court of Louisiana but was one by the Supreme Court of Mississippi, the official report being 101 Miss. 204. The opinion of the court of Mississippi sustaining a suggestion of error in the case of *Comans v. Tapley* cited by Respondents is not here applicable, for therein it was stated, "The power of a court of equity to enforce the doctrine of laches, where the delay is for a period less than the time required by the statute of limitation, is not here involved, for the reason that the longest period of time prescribed by any statute of limitations has four times passed since the decree was rendered". The enforcement of a decree rendered more than forty years prior to institution of the Comans' suit was the subject of that litigation.[1]

Much less than the prescriptive period of time had elapsed from the time when Stricker might first have brought his action to the date he instituted this suit.

Likewise the case of *Marks v. Toney* cited by Respondents, giving only the Southern Reporter citation and not the official report, was a decision by a Mississippi court and not a Louisiana court, as this Court might be led to believe without looking to the books themselves, the official report of that case being 196 Miss. 572. The court in *Marks v. Toney* was dealing with a situation where the longest period of limitation or prescription that was applicable, if any were appli-

[1] *Comans v. Tapley*, 57 So. 567, 573.

cable to the situation, was either the three year statute of limitations applicable to acts or the six year statute applicable to an obligation for payment evidenced by a writing, whereas eleven years had elapsed since the right of action had accrued. The court in effect held that laches might be invoked in instances of long or protracted delay working to the disadvantage of another "although no expressed statute of limitations is available", unless facts are shown which will rebut the presumption of injustice arising out of the apparently undue delay, or which will excuse the same.

In the case now presented to this Court upon Application for Writ of Certiorari, Stricker's claim could not have been barred by Louisiana prescription or Mississippi limitation until the year 1957. This record is replete with documentary evidence explaining such delay as did occur before the filing of the suit and justifying whatever delay there was in the filing of it, viz.:

The record shows that in January 1945 there was correspondence between Stricker and Morgan discussing the respective rights of the parties in the Esperanza Property but those discussions were not brought to any final determination and at that time Morgan had not recovered, as he was entitled under the contract, all of his costs of purchase of the property. It was not until the year 1947 that Morgan recovered the costs principally from the sale of some of the timber, the profits from which timber sale were then divided equally between the parties, that Stricker had a right to demand by way of accounting and division of the profits a deed to

himself from Morgan to a one-half interest in the remainder of the property, i.e., the land and all remaining timber thereon. As this record discloses, in every other instance where land had been purchased, for convenience title was permitted to remain in Morgan for some years after Morgan had recovered his costs and after other profits therefrom had been divided.—the parties continuing to manage and control the same for their mutual benefit under the general supervision and management of Stricker for the purpose of farming same in some instances, raising cattle thereon, harvesting timber therefrom, etc., and in every instance with the exception of Esperanza Morgan ultimately deeded to Stricker one-half of the interest in the land. During the time that elapsed from the timber sale in 1947 to the time of institution of this suit, the record discloses that Stricker with the collaboration of Morgan continued to look after this Esperanza Plantation property, protecting its lines, procuring surveys to be made, negotiating pipe line rights-of-way and resultant damages to the property, making inspections of it (occasionally together) and participating in the negotiation for the drilling of directional wells to be bottomed on other lands. It was not until Stricker discovered by matter of record that Morgan had dealt with this land adversely to him in 1952 by making donations of royalty to members of his (Morgan's) family that it became apparent to Stricker that he must institute this action to protect his rights. At the time he instituted his suit Morgan was in good health and Stricker could not foresee the subsequent illness suffered by Morgan or the ravages

of the disease which would, as it did, impair Morgan's mental capacities.

Respondents contend that upon the sale of the timber Stricker refused to "pay any part of the expenses attributable to the Esperanza land". This we dispute. Stricker and Morgan proposing at the time of the timber sale to divide to that time only the profits from the sale of the timber, Stricker did no more than request an accounting at that time of costs deductible from the profits of that sale for his income tax payment purposes.[34]

Other erroneous factual statements contained on page 22 of Respondents' brief have elsewhere been answered herein by Petitioner.

Reply of Petitioner to Respondents' "Position 4".

The argument made unto this "Position" by Respondents deals strictly with the question of whether the relationship of partnership existed between these parties.

It is not essential to Petitioner's right to relief in this case that the relationship between himself and Morgan be adjudicated to have been a partnership relationship or to have been, for that matter, a relationship of joint adventurers. Stricker is entitled to his relief under general principles of equity, which are recognized and in proper cases will be accorded to a complaining party under the jurisprudence not only of Mississippi but also

[34] Appendix 2504B, p. 80.

of Louisiana (Civil Code, Article 21), so we come to a discussion of the factual assertions made by Respondents on pages 23 and 24 of their brief, all of which, we say, are untrue, as this record discloses, viz.:

1. No separate consideration was paid for the timber upon the purchase of Esperanza Plantation. See that set forth on page 17 of the Petition for Writ of Certiorari.

2. The timber was not acquired separately from the land. It was acquired by one deed from Campbell. See Appendix 2504-B, page 21.

3. Morgan did not procure the timber to be assessed separately from the land or to have the ad valorem taxes prorated between the timber and the land. The facts are that under the law of Louisiana land was assessed by evaluating several elements thereof, i.e., the acreage of the land inside the levee, the acreage outside the levee, the improvements on the land, the standing timber thereon, etc., and the assessments had been so handled prior to the conveyance by Campbell to Morgan and, in accordance with the law regulating assessments, were similarly handled thereafter. See Appendix 2504-B, pages 91, 92 and 93. Indeed, when Morgan's attention was called to the fact that for tax assessments the timber was evaluated by the assessor and the acreage was evaluated by the assessor to make up the total evaluation upon which the tax levy was laid, he stated in a letter to Stricker dated May 19, 1947, "As to taxes, I have never seen the tax receipts. I only went by the total charges on the ledger. If anyone would have told me they were charged separately like

that I would not have believed it". See Appendix 2504-B, page 89. We consider this contention by Respondents utterly unfair and lacking in good faith, for those exhibits were well known to Respondents.

4. The parties did not treat the timber as a separate and distinct transaction from the land, initially or subsequently. Initially the parties had intended to purchase timber only. They could not purchase the timber without purchasing the entire fee, land and all. The entire fee accordingly was purchased by one deed. Thereafter Stricker negotiated the oil lease, requiring special provisions therein and seeking additional special provisions. Included amongst these special provisions Stricker was desirous of having the oil lease contain no covenant of warranty of title or acreage and to provide that "shut-in-gas well with a resultant annual payment of only $50.00 should not perpetuate the lease against an annual delay rental of $1250.00". Stricker saw to the proper execution of the lease, its delivery and the collection of the cash consideration for it and its transmittal to Morgan, having an interest therein, for its credit against the cost as had been done by him in other like transactions. Morgan considered only one-half of the cash consideration for the lease and subsequent delay rent payments as being his own and accordingly on his income tax returns accounted for only one-half of the totals. Stricker by supervision protected the property and its boundaries, negotiated for the sale of timber therefrom and procured surveys of the boundaries and of areas of timber dam-

> age, for the cost of which Stricker and Morgan each bore one-half of the cost. Morgan recognized Stricker's one-half interest in the Esperanza Plantation property (land and all) when by dictation he had his secretary make a bid in the name of Morgan's Louisiana Box & Lumber Company for the timber on the land by letter addressed to both Stricker and Morgan and describing the same as "now standing and being upon the Esperanza Plantation and now owned by you". See Appendix VII to Petition for Writ of Certiorari, page 58 (Plaintiff's Exhibit 118). As he had previously so recognized by his other communications in writing.[35]

The Respondents in their brief have said that "the Louisiana cases recognized that Act 188 of 1904 created two distinct estates—one in the land and one in the timber". This is not a correct statement of the law. All that the said Act 188 did was to provide that when the fee owner of land has made a conveyance of the standing timber thereon to another person the "standing timber shall remain an immovable (continue as in common law states to be realty) and be subject to all of the laws relative to immovables, even when separated in ownership from the land on which it stands"—until it is actually severed from the land, thereby becoming personalty or a movable property. In the case at bar, the fee (land, timber, minerals, everything)

[35] See letter Dale to Morgan, September 16, 1941, Pl. Ex. 34, Appendix VII to the Petition for Writ of Certiorari, p. 57. Morgan's reply to Dale of September 23, 1941 in which Morgan said "I will take same up with our good friend Mr. Stricker who is a partner in this buy", Appendix 2504-B, p. 37, and see also letters in Appendix 2504-B, pages 39, 47 and 49.

was conveyed into the name of Morgan by the deed from Campbell, insofar as the conveyance records of Concordia Parish, Louisiana are concerned. There was never any subsequent record separation of ownership of timber from land. There is no evidence whatsoever in this record that Stricker's rights should be limited to the standing timber or to the profits from it, and there is no evidence but that the parties were to have the same rights in this purchase respectively as they had in the other transactions entered into pursuant to their original agreement.

No separate estate in timber as distinguished from land ever having been created, the fact that Stricker and Morgan did divide the net proceeds of the timber sale is convincing evidence of Stricker's rights *ab initio* in the land (the entire immovable) by its acquisition by the deed from Campbell. Great emphasis is supplied to this by the admission of record that by such purchase Stricker acquired a one-half interest in the timber despite the unsupported contention of the Respondents that under Louisiana law he could not therefore have acquired a one-half interest in the land itself.

Agreement to Share Profits and Losses.

Respondents on pages 28 and 29 of their brief make the following statements:

> "Nor does this record show the creation of a profit and loss sharing contract or agreement. None such existed. Obviously, all that occurred was that Petitioner Stricker brought to Respondent Morgan

a deal (Walnut Grove) which Respondent Morgan decided to finance."

* * * * * * *

"*There is nothing in this record to show a general agreement to share in the profits and losses equally.* It was pointed out by the Trial Court and the Circuit Court in considerable detail the many different arangements made by the parties in the various deals and we will not now repeat them."

There is absolutely no truth in these statements made by Respondents in their brief. In a letter to Petitioner dated October 28, 1943, by Morgan, we find the following language:

"* * * It was my opinion all along that we stood the losses and the gains."[9]

This representation on the part of Respondents which is so contrary to the facts proved by the record is typical of a large portion of the claims made by Respondents in their brief filed in opposition to Petitioner's Application for Writ of Certorari.

Previously Morgan had reminded Stricker of their original agreement which was the basis of all of their transactions for purchase of lands and timber when by his letter of August 8, 1942 to Stricker, he said:

"Remember our origifial agreement on every deal that we made at the start * * *"[10]

[9] Appendix 2504-B, pages 1 and 2
[10] Appendix 2504-B, page 3

With shocking lack of credentials to be gleaned from anything in this record, Respondents now, belatedly, seek to avoid the damning effect of Morgan's written admissions against interest by weakly stating (page 31 of Respondents' opposition) that "frequently" Morgan's "use (of the word "we" and "us") was occasioned by Respondent Morgan's inclusion of his partners in Louisiana Box in some instances and with his son alone in others".

We have searched the record exhibits to find one reference by Morgan, in any communication whatever, to his "partner" son, Eddie, or his "partner" bookkeeper, Fred N. Owen, or to his "partnership" of Louisiana Box & Lumber Company as having any interest whatsoever in the fee of, or in the timber on, Esperanza Plantation. We *find none;* and *this Court will find none.*

Son Eddie has stipulated that he knows nothing and never knew anything whatsoever pertaining to the facts and subject matter involved in this litigation.[a]

Bookkeeper Owen testified that he has no claim to any interest in this property; that the land was never an asset of Louisiana Box & Lumber Company; and that the only entries originally made on the books of Louisiana Box & Lumber Company were of the two checks which Morgan had him issue to pay, in part, for the Esperanza purchase, which checks were promptly charged off "to log costs", and that later upon an audit he was required to charge the amounts thereof to

[a] R. Vol. 5, p. 871

Morgan, individually. Therefore, the standing timber was never carried as an asset of the Box Company.[39]

The Box Company later bid for some of the timber in 1947, as being on property belonging to Stricker and Morgan.[40]

Only for income tax payment benefits does it appear that Morgan treated his son, Eddie, as having some interest in this property, and only for income tax payment benefits does it appear that long after the sale of timber to the General Box Company did Morgan have his share of the profits from such sale entered on the books of his Lumber Company and charged same against himself. Only after oil was being produced from Esperanza did Morgan pay his share of such profits into funds of his Box Company.[41]

We feel justified in charging that all this "finagling" of Morgan's ledgers and his Box Company records was a part of his scheme to defraud Stricker of his just dues.

Stricker and Morgan were the only persons who were interested in the purchase of Esperanza, either land or timber. They were the only persons to whom, in context, Morgan can be said to have referred when in his letters (written declarations against interest) he made references to "we", "us", "ours", and the like.

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[39] R. Vol. 6, pp. 1174-1188; R. Vol. 7, p. 1261; R. Vol. 9, pp. 1707-1713.

[40] Appendix VII, p. 118.

[41] R. Vol. 7, pp. 1261-1274; R. Vol. 9, pp. 1711-1723; R. Vol. 10, pp. 1856-1862; R. Vol. 7, pp. 1328-1330; R. Vol. 10, p. 1874, and exhibits referred to therein.

We think that elsewhere herein and in our Application for Writ of Certiorari we have answered the other factual contentions of Respondents set forth on pages 27-33 of Respondent's brief, with all of which we take issue.

Counter-Letter.

The statement of Respondents on page 38 of their brief is an attempt to lead the Court to believe that under the law of Louisiana a counter-letter, to be effective, must be executed in the same manner as the instrument which it affects and must follow some particular form. Such is not the law of Louisiana.

Louis v. Garrison, 64 So.(2d) 254, (La. App., Orl. 1953); *Morgan v. Hathaway*, 77 So.(2d) 169 (La. App. 1st Cir. 1955);
Tulane Law Review, Vol. 17, p. 462;
Succession of Curtis, 100 So. 412 (Sup. Ct. La. 1924, 156 La.)

CONCLUSION.

Wherefore, Petitioner does most earnestly submit that in this case the Court of Appeals has decided a most important state question in a way that is in conflict with the applicable state law. In this case the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of super-

vision. Hence Petitioner submits that the Writ of Certiorari should be granted as prayed.

Respectfully submitted,

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CERTIFICATE.

I, the undersigned, Edwin Leland Richardson, do hereby certify that I have on this date transmitted a copy of the above and foregoing Brief of Petitioner, R. M. Stricker, to each of the attorneys of record for the Respondent, J P. Morgan, et al., addressed to them at their respective post office addresses as shown of record herein, namely, Messrs. William H. Talbot, Attorney at Law, 808 Whitney National Bank Building, New Orleans, Louisiana and C Delbert Hosemann, Attorney at Law, Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi.

This the day of February, 1960.

EDWIN LELAND RICHARDSON,
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